

CHILD OBSCENITY AND PORNOGRAPHY PREVENTION ACT OF 2002

JUNE 24, 2002.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4623]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4623) to prevent trafficking in child pornography and obscenity, to proscribe pandering and solicitation relating to visual depictions of minors engaging in sexually explicit conduct, to prevent the use of child pornography and obscenity to facilitate crimes against children, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Child Obscenity and Pornography Prevention Act of 2002”.

SEC. 2. FINDINGS.

Congress finds the following:

(1) Obscenity and child pornography are not entitled to protection under the First Amendment under *Miller v. California*, 413 U.S. 15 (1973) (obscurity), or *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography) and thus may be prohibited.

(2) The Government has a compelling state interest in protecting children from those who sexually exploit them, including both child molesters and child pornographers. “The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance,” *New York v. Ferber*, 458 U.S. 747, 757 (1982) (emphasis added), and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain. *Osborne v. Ohio*, 495 U.S. 103, 110 (1990).

(3) The Government thus has a compelling interest in ensuring that the criminal prohibitions against child pornography remain enforceable and effective. “[T]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.” *Ferber*, 458 U.S. at 760.

(4) In 1982, when the Supreme Court decided *Ferber*, the technology did not exist to: (A) create depictions of virtual children that are indistinguishable from depictions of real children; (B) create depictions of virtual children using compositions of real children to create an unidentifiable child; or (C) disguise pictures of real children being abused by making the image look computer generated.

(5) Evidence submitted to the Congress, including from the National Center for Missing and Exploited Children, demonstrates that technology already exists to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer generated. The technology will soon exist, if it does not already, to make depictions of virtual children look real.

(6) The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and/or related media.

(7) There is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children. Nevertheless, technological advances since *Ferber* have led many criminal defendants to suggest that the images of child pornography they possess are not those of real children, insisting that the government prove beyond a reasonable doubt that the images are not computer-generated. Such challenges will likely increase after the *Ashcroft v. Free Speech Coalition* decision.

(8) Child pornography circulating on the Internet has, by definition, been digitally uploaded or scanned into computers and has been transferred over the Internet, often in different file formats, from trafficker to trafficker. An image seized from a collector of child pornography is rarely a first-generation product, and the retransmission of images can alter the image so as to make it difficult for even an expert conclusively to opine that a particular image depicts a real child. If the original image has been scanned from a paper version into a digital format, this task can be even harder since proper forensic delineation may depend on the quality of the image scanned and the tools used to scan it.

(9) The impact on the government’s ability to prosecute child pornography offenders is already evident. The Ninth Circuit has seen a significant adverse effect on prosecutions since the 1999 Ninth Circuit Court of Appeals decision in *Free Speech Coalition*. After that decision, prosecutions generally have been brought in the Ninth Circuit only in the most clear-cut cases in which the government can specifically identify the child in the depiction or otherwise identify the origin of the image. This is a fraction of meritorious child pornography cases. The National Center for Missing and Exploited Children testified that, in light of the Supreme Court’s affirmation of the Ninth Circuit decision, prosecutors in various parts of the country have expressed concern about the continued viability of previously indicted cases as well as declined potentially meritorious prosecutions.

(10) In the absence of congressional action, this problem will continue to grow increasingly worse. The mere prospect that the technology exists to create computer or computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution, for it threatens to create a reasonable doubt in every case of computer images even when a real child was abused. This threatens to render child pornography laws that protect real children unenforceable.

(11) To avoid this grave threat to the Government's unquestioned compelling interest in effective enforcement of the child pornography laws that protect real children, a statute must be adopted that prohibits a narrowly-defined subcategory of images.

(12) The Supreme Court's 1982 *Ferber v. New York* decision holding that child pornography was not protected drove child pornography off the shelves of adult bookstores. Congressional action is necessary to ensure that open and notorious trafficking in such materials does not reappear.

SEC. 3. IMPROVEMENTS TO PROHIBITION ON VIRTUAL CHILD PORNOGRAPHY.

(a) Section 2256(8)(B) of title 18, United States Code, is amended to read as follows:

“(B) such visual depiction is a computer image or computer-generated image that is, or is indistinguishable (as defined in section 1466A) from, that of a minor engaging in sexually explicit conduct; or”.

(b) Section 2256(2) of title 18, United States Code, is amended to read as follows:

“(2)(A) Except as provided in subparagraph (B), ‘sexually explicit conduct’ means actual or simulated—

“(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

“(ii) bestiality;

“(iii) masturbation;

“(iv) sadistic or masochistic abuse; or

“(v) lascivious exhibition of the genitals or pubic area of any person;

“(B) For purposes of subsection 8(B) of this section, ‘sexually explicit conduct’ means—

“(i) actual sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;

“(ii) actual or lascivious simulated;

“(I) bestiality;

“(II) masturbation; or

“(III) sadistic or masochistic abuse; or

“(iii) actual or simulated lascivious exhibition of the genitals or pubic area of any person;”.

(c) Section 2252A(c) of title 18, United States Code, is amended to read as follows:

“(c)(1) Except as provided in paragraph (2), it shall be an affirmative defense to a charge of violating this section that the alleged offense did not involve the use of a minor or an attempt or conspiracy to commit an offense under this section involving such use.

“(2) A violation of, or an attempt or conspiracy to violate, this section which involves child pornography as defined in section 2256(8)(A) or (C) shall be punishable without regard to the affirmative defense set forth in paragraph (1).”.

SEC. 4. PROHIBITION ON PANDERING MATERIALS AS CHILD PORNOGRAPHY.

(a) Section 2256(8) of title 18, United States Code, is amended—

(1) in subparagraph (C), by striking “or” at the end and inserting “and”; and

(2) by striking subparagraph (D).

(b) Chapter 110 of title 18, United States Code, is amended—

(1) by inserting after section 2252A the following:

“§ 2252B. Pandering and solicitation

“(a) Whoever, in a circumstance described in subsection (d), offers, agrees, attempts, or conspires to provide or sell a visual depiction to another, and who in connection therewith knowingly advertises, promotes, presents, or describes the visual depiction with the intent to cause any person to believe that the material is, or contains, a visual depiction of a minor engaging in sexually explicit conduct shall be subject to the penalties set forth in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction.

“(b) Whoever, in a circumstance described in subsection (d), offers, agrees, attempts, or conspires to receive or purchase from another a visual depiction that he believes to be, or to contain, a visual depiction of a minor engaging in sexually explicit conduct shall be subject to the penalties set forth in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction.

“(c) It is not a required element of any offense under this section that any person actually provide, sell, receive, purchase, possess, or produce any visual depiction.

“(d) The circumstance referred to in subsection (a) and (b) is that—

“(1) any communication involved in or made in furtherance of the offense is communicated or transported by the mail, or in interstate or foreign commerce by any means, including by computer, or any means or instrumentality of interstate or foreign commerce is otherwise used in committing or in furtherance of the commission of the offense;

“(2) any communication involved in or made in furtherance of the offense contemplates the transmission or transportation of a visual depiction by the mail, or in interstate or foreign commerce by any means, including by computer;

“(3) any person travels or is transported in interstate or foreign commerce in the course of the commission or in furtherance of the commission of the offense;

“(4) any visual depiction involved in the offense has been mailed, or has been shipped or transported in interstate or foreign commerce by any means, including by computer, or was produced using materials that have been mailed, or that have been shipped or transported in interstate or foreign commerce by any means, including by computer; or

“(5) the offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.”;

(2) in the analysis for the chapter, by inserting after the item relating to section 2252A the following:

“2252B. Pandering and solicitation.”.

SEC. 5. PROHIBITION OF OBSCENITY DEPICTING YOUNG CHILDREN.

(a) Chapter 71 of title 18, United States Code, is amended—

(1) by inserting after section 1466 the following:

“§ 1466A. Obscene visual depictions of young children

“(a) Whoever, in a circumstance described in subsection (d), knowingly produces, distributes, receives, or possesses with intent to distribute a visual depiction that is, or is indistinguishable from, that of a pre-pubescent child engaging in sexually explicit conduct, or attempts or conspires to do so, shall be subject to the penalties set forth in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction.

“(b) Whoever, in a circumstance described in subsection (d), knowingly possesses a visual depiction that is, or is indistinguishable from, that of a pre-pubescent child engaging in sexually explicit conduct, or attempts or conspires to do so, shall be subject to the penalties set forth in section 2252A(b)(2), including the penalties provided for cases involving a prior conviction.

“(c) For purposes of this section—

“(1) the term ‘visual depiction’ includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image, and also includes any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means;

“(2) the term ‘pre-pubescent child’ means that (A) the child, as depicted, is one whose physical development indicates the child is 12 years of age or younger; or (B) the child, as depicted, does not exhibit significant pubescent physical or sexual maturation. Factors that may be considered in determining significant pubescent physical maturation include body habitus and musculature, height and weight proportion, degree of hair distribution over the body, extremity proportion with respect to the torso, and dentition. Factors that may be considered in determining significant pubescent sexual maturation include breast development, presence of axillary hair, pubic hair distribution, and visible growth of the sexual organs;

“(3) the term ‘sexually explicit conduct’ has the meaning set forth in section 2256(2); and

“(4) the term ‘indistinguishable’ used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor

engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.

“(d) The circumstance referred to in subsections (a) and (b) is that—

“(1) any communication involved in or made in furtherance of the offense is communicated or transported by the mail, or in interstate or foreign commerce by any means, including by computer, or any means or instrumentality of interstate or foreign commerce is otherwise used in committing or in furtherance of the commission of the offense;

“(2) any communication involved in or made in furtherance of the offense contemplates the transmission or transportation of a visual depiction by the mail, or in interstate or foreign commerce by any means, including by computer;

“(3) any person travels or is transported in interstate or foreign commerce in the course of the commission or in furtherance of the commission of the offense;

“(4) any visual depiction involved in the offense has been mailed, or has been shipped or transported in interstate or foreign commerce by any means, including by computer, or was produced using materials that have been mailed, or that have been shipped or transported in interstate or foreign commerce by any means, including by computer; or

“(5) the offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.

“(e) In a case under subsection (b), it is an affirmative defense that the defendant—

“(1) possessed less than three such images; and

“(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof—

“(A) took reasonable steps to destroy each such image; or

“(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

“§ 1466B. Obscene visual representations of pre-pubescent sexual abuse

“(a) Whoever, in a circumstance described in subsection (e), knowingly produces, distributes, receives, or possesses with intent to distribute a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that—

“(1) depicts a pre-pubescent child engaging in sexually explicit conduct, and

“(2) is obscene, or who attempts or conspires to do so, shall be subject to the penalties set forth in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction.

“(b) Whoever, in a circumstance described in subsection (e), knowingly possesses a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that—

“(1) depicts a pre-pubescent child engaging in sexually explicit conduct, and

“(2) is obscene,

“or who attempts or conspires to do so, shall be subject to the penalties set forth in section 2252A(b)(2), including the penalties provided for cases involving a prior conviction.

“(c) It is not a required element of any offense under this section that the pre-pubescent child depicted actually exist.

“(d) For purposes of this section, the terms ‘visual depiction’ and ‘pre-pubescent child’ have respectively the meanings given those terms in section 1466A, and the term ‘sexually explicit conduct’ has the meaning given that term in section 2256(2)(B).

“(e) The circumstance referred to in subsection (a) and (b) is that—

“(1) any communication involved in or made in furtherance of the offense is communicated or transported by the mail, or in interstate or foreign commerce by any means, including by computer, or any means or instrumentality of interstate or foreign commerce is otherwise used in committing or in furtherance of the commission of the offense;

“(2) any communication involved in or made in furtherance of the offense contemplates the transmission or transportation of a visual depiction by the mail, or in interstate or foreign commerce by any means, including by computer;

“(3) any person travels or is transported in interstate or foreign commerce in the course of the commission or in furtherance of the commission of the offense;

“(4) any visual depiction involved in the offense has been mailed, or has been shipped or transported in interstate or foreign commerce by any means, including by computer, or was produced using materials that have been mailed, or that have been shipped or transported in interstate or foreign commerce by any means, including by computer; or

“(5) the offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.

“(f) In a case under subsection (b), it is an affirmative defense that the defendant—

“(1) possessed less than three such images; and

“(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof—

“(A) took reasonable steps to destroy each such image; or

“(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.”; and

(2) in the analysis for the chapter, by inserting after the item relating to section 1466 the following:

“1466A. Obscene visual depictions of young children.

“1466B. Obscene visual representations of pre-pubescent sexual abuse.”.

(b)(1) Except as provided in paragraph (2), the applicable category of offense to be used in determining the sentencing range referred to in section 3553(a)(4) of title 18, United States Code, with respect to any person convicted under section 1466A or 1466B of such title, shall be the category of offenses described in section 2G2.2 of the Sentencing Guidelines.

(2) The Sentencing Commission may promulgate guidelines specifically governing offenses under section 1466A of title 18, United States Code, provided that such guidelines shall not result in sentencing ranges that are lower than those that would have applied under paragraph (1).

SEC. 6. PROHIBITION ON USE OF MATERIALS TO FACILITATE OFFENSES AGAINST MINORS.

Chapter 71 of title 18, United States Code, is amended—

(1) by inserting at the end the following:

“§ 1471. Use of obscene material or child pornography to facilitate offenses against minors

“(a) Whoever, in any circumstance described in subsection (c), knowingly—

“(1) provides or shows to a person below the age of 16 years any visual depiction that is, or is indistinguishable from, that of a pre-pubescent child engaging in sexually explicit conduct, any obscene matter, or any child pornography; or

“(2) provides or shows any obscene matter or child pornography, or any visual depiction that is, or is indistinguishable from, that of a pre-pubescent child engaging in sexually explicit conduct, or any other material assistance to any person in connection with any conduct, or any attempt, incitement, solicitation, or conspiracy to engage in any conduct, that involves a minor and that violates chapter 109A, 110, or 117, or that would violate chapter 109A if the conduct occurred in the special maritime and territorial jurisdiction of the United States,

shall be subject to the penalties set forth in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction.

“(b) For purposes of this section—

“(1) the term ‘child pornography’ has the meaning set forth in section 2256(8);

“(2) the terms ‘visual depiction’, ‘pre-pubescent child’, and ‘indistinguishable’ have the meanings respectively set forth for those terms in section 1466A(c); and

“(3) the term ‘sexually explicit conduct’ has the meaning set forth in section 2256(2).

“(c) The circumstance referred to in subsection (a) is that—

“(1) any communication involved in or made in furtherance of the offense is communicated or transported by the mail, or in interstate or foreign commerce by any means, including by computer, or any means or instrumentality of interstate or foreign commerce is otherwise used in committing or in furtherance of the commission of the offense;

“(2) any communication involved in or made in furtherance of the offense contemplates the transmission or transportation of a visual depiction or obscene matter by the mail, or in interstate or foreign commerce by any means, including by computer;

“(3) any person travels or is transported in interstate or foreign commerce in the course of the commission or in furtherance of the commission of the offense;

“(4) any visual depiction or obscene matter involved in the offense has been mailed, or has been shipped or transported in interstate or foreign commerce by any means, including by computer, or was produced using materials that

have been mailed, or that have been shipped or transported in interstate or foreign commerce by any means, including by computer; or

“(5) the offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.”;

(2) in the analysis for the chapter, by inserting at the end the following:

“1471. Use of obscene material or child pornography to facilitate offenses against minors.”.

SEC. 7. EXTRATERRITORIAL PRODUCTION OF CHILD PORNOGRAPHY FOR DISTRIBUTION IN THE UNITED STATES.

Section 2251 is amended—

(1) by striking “subsection (d)” each place it appears in subsections (a), (b), and (c) and inserting “subsection (e)”;

(2) by redesignating subsections (c) and (d), respectively, as subsections (d) and (e); and

(3) by inserting after subsection (b) a new subsection (c) as follows:

“(c)(1) Any person who, in a circumstance described in paragraph (2), employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct outside of the United States, its possessions and Territories, for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e).

“(2) The circumstance referred to in paragraph (1) is that—

“(A) the person intends such visual depiction to be transported to the United States, its possessions, or territories, by any means including by computer or mail;

“(B) the person transports such visual depiction to, or otherwise makes it available within, the United States, its possessions, or territories, by any means including by computer or mail.”.

SEC. 8. STRENGTHENING ENHANCED PENALTIES FOR REPEAT OFFENDERS.

Sections 2251(e) (as redesignated by section 7(2)), 2252(b), and 2252A(b) of title 18, United States Code, are each amended by inserting “chapter 71,” immediately before each occurrence of “chapter 109A,”.

SEC. 9. SERVICE PROVIDER REPORTING OF CHILD PORNOGRAPHY AND RELATED INFORMATION.

(a) Section 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032) is amended—

(1) in subsection (b)(1)—

(A) by inserting “2252B,” after “2252A,”; and

(B) by inserting “or a violation of section 1466A or 1466B of that title,” after “of that title,”;

(2) in subsection (c), by inserting “or pursuant to” after “to comply with”;

(3) by amending subsection (f)(1)(D) to read as follows:

“(D) where the report discloses a violation of State criminal law, to an appropriate official of a State or subdivision of a State for the purpose of enforcing such State law.”;

(4) by redesignating paragraph (3) of subsection (b) as paragraph (4); and

(5) by inserting after paragraph (2) of subsection (b) the following new paragraph:

“(3) In addition to forwarding such reports to those agencies designated in subsection (b)(2), the National Center for Missing and Exploited Children is authorized to forward any such report to an appropriate official of a state or subdivision of a state for the purpose of enforcing state criminal law.”.

(b) Section 2702 of title 18, United States Code is amended—

(1) in subsection (b)—

(A) in paragraph (6)—

(i) by inserting “or” at the end of subparagraph (A)(ii);

(ii) by striking subparagraph (B); and

(iii) by redesignating subparagraph (C) as subparagraph (B);

(B) by redesignating paragraph (6) as paragraph (7);

(C) by striking “or” at the end of paragraph (5); and

(D) by inserting after paragraph (5) the following new paragraph:

“(6) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032); or”; and

(2) in subsection (c)—

(A) by striking “or” at the end of paragraph (4);

(B) by redesignating paragraph (5) as paragraph (6); and

(C) by adding after paragraph (4) the following new paragraph:

“(5) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032); or”.

SEC. 10. SEVERABILITY.

If any provision of this Act, or the application of such provision to any person or circumstance, is held invalid, the remainder of this Act, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.

SEC. 11. INVESTIGATIVE AUTHORITY RELATING TO CHILD PORNOGRAPHY.

Section 3486(a)(1)(C)(i) of title 18, United States Code, is amended by striking “the name, address” and all that follows through “subscriber or customer” and inserting “the information specified in section 2703(c)(2)”.

PURPOSE AND SUMMARY

H.R. 4623, the “Child Obscenity and Pornography Prevention Act of 2002,” addresses the April 16, 2002 Supreme Court decision in *Ashcroft v. the Free Speech Coalition*¹ to ensure the continued protection of children from sexual exploitation. In response to the Court decision, this bill narrows the definition of child pornography, strengthens the existing affirmative defense, amends the obscenity laws to address virtual and real child pornography that involves visual depictions of pre-pubescent children, creates new offenses against pandering visual depictions as child pornography, and creates new offenses against providing children obscene or pornographic material.

BACKGROUND AND NEED FOR THE LEGISLATION

The Ashcroft v. Free Speech Coalition

On April 16, 2002, the Supreme Court, in *Ashcroft v. Free Speech Coalition*, held that two parts of the Federal definition of child pornography in title 18 of the United States Code were overbroad and unconstitutional. Those two provisions are 18 U.S.C. § 2256(8)(B), which defined child pornography to include wholly computer generated pictures that appear to be of a minor engaging in sexually explicit conduct, and 18 U.S.C. § 2256(8)(D), which defines child pornography to include a visual depiction where it is advertised, promoted, or presented, to convey the impression that the material contains a visual depiction of a minor engaging in sexually explicit conduct.

This decision did not hold that all virtual child pornography was protected by the First Amendment. For instance, the Court mentions, in dicta, that “[a]llthough morphed images may fall within the definition of virtual child pornography, they [morphed images] implicate the interests of real children and are in that sense closer to the images in *Ferber*.”² In *New York v. Ferber*, the Court found child pornography was not entitled to First Amendment protection because of the State’s interest in protecting children.³ The Court reasoned that “the use of [real] children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.”⁴ It should be noted that computer technology

¹ 122 S.Ct. 1389 (2002).

² *Id.* at 1397 (the Court discusses a third section of the definition of child pornography under the Federal statute, which was not challenged. That definition is under 18 U.S.C. § 2256(8)(C) and prohibits creating virtual images by morphing.)

³ 458 U.S. 747 (1982).

⁴ *Id.* at 758.

did not exist in 1982 to create computer-generated visual depictions that are indistinguishable from depictions of real children.⁵

Further, the Court did not hold that Congress was not allowed to prohibit virtual child pornography when the prohibition is narrowly-drawn to promote a compelling government interest. In fact, the Court in its opinion, expressly left that option open for Congress. The Court stated: “We need not decide, however, whether the Government could impose this burden on a speaker. Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own terms.”⁶ Justice Thomas in his concurring opinion stated that the “Court does leave open the possibility that a more complete affirmative defense could save a statute’s constitutionality, see *ante*, at 1405, implicitly accepting that some regulation of virtual child pornography might be constitutional.”⁷ No member of the Court took exception with his conclusion.

The Government’s Compelling Interest to have Effective Prosecution of those who Sexual Exploit Children

Congress clearly has a compelling interest to protect children from sexual exploitation. That interest extends to the prosecution of those who would or do exploit children.

A representative from the Department of Justice testified:

As Justice Thomas noted in his concurring opinion, “if technological advances thwart prosecution of ‘unlawful speech,’ the Government may well have a compelling interest in barring or otherwise regulating some narrow category of ‘lawful speech’ in order to enforce effectively laws against pornography made through the abuse of real children.” 122 S. Ct. at 1406–07 (Thomas, J., concurring in the judgment). Similarly, Justice O’Connor noted in her opinion concurring in part and dissenting in part that, “given the rapid pace of advances in computer-graphics technology, the Government’s concern is reasonable.” *Id.* at 1409. Moreover, to avert serious harms, Congress may rely on reasonable predictive judgments, even when legislating in an area implicating freedom of speech. See *Turner Broad. Sys. Inc. v. FCC*, 520 U.S. 180, 210–11 (1997). We believe that Congress has a strong basis for concluding that the very existence of sexually explicit computer images that are virtually indistinguishable from images of real minors engaged in sexually explicit conduct poses a serious danger to future prosecutions involving child pornography. Indeed, we already have some sense of the impact of the Court’s decision. The Ninth Circuit had invalidated the same provisions of law in 1999, and all accounts indicate that the number and scope of child pornography prosecutions brought by our prosecutors in the Ninth Circuit has been adversely impacted.⁸

⁵Hearing on the April 16, 2002 Supreme Court decision in *Ashcroft v. the Free Speech Coalition Before the House Subcomm. Crime, Terrorism, and Homeland Security, Comm. on the Judiciary*, 107th Cong. (2002) (prepared statement of Ernest E. Allen, President & Chief Executive Officer, National Center for Missing and Exploited Children).

⁶*Free Speech Coalition*, 122 S.Ct. at 1405 (2002).

⁷*Id.* at 1407 (2002) (Thomas, J., concurring).

⁸*Legislative Hearing on H.R. 4623, the “Child Obscenity and Pornography Prevention Act of 2002,” and H.R. 4477, the “Sex Tourism Prohibition Improvement Act of 2002,” Before the House*

Prosecutions are threatened because the vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, or related media. This poses a serious problem for the effective prosecution of those who sexually exploit children. Evidence submitted to the Congress demonstrated that computer technology exists today to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer generated. Furthermore, the evidence illustrated that the technology will soon exist, if it does not already, to make depictions of virtual children look real and completely indistinguishable. At a May 1, 2002 hearing before the Subcommittee on Crime, Terrorism, and Homeland Security, the President and Chief Executive Officer (CEO) of the National Center for Missing and Exploited Children (NCMEC) demonstrated the difficulty in distinguishing depictions of real children from computer-generated children. The NCMEC produced a 100 percent computer-generated picture with an “off-the-shelf” software product.⁹

Now, the mere possibility that this type of technology was used provides sexual predators who utilized a computer with a claim that the child pornography they possess does not contain real children. Appeals for such convictions are occurring throughout the Nation.

The San Antonio Express-News reported that on June 13, in a “sharply worded order” the U.S. District Judge refused to let a doctor remain free pending appeal on his conviction of possessing child pornography stating that the physician had “manipulated the system,” long enough in an attempt to delay his punishment.¹⁰ The appeal came after the Free Speech Coalition decision and challenged the conviction because the government was not required to prove that the children depicted in his pornographic images obtained online were real.¹¹ In the District Court order, the Judge did acknowledge that the appeal raised a “substantial question” that emerged from the *Ashcroft v. Free Speech Coalition* decision and “that presents a quandary for prosecutors and courts.”¹² The article noted that similar challenges are pending across the Nation.¹³

The quandary is that, while there is no substantial evidence that any of the child pornography images being trafficked today were made in any other way than by the abuse of real children, technological advances are leading many criminal defendants to suggest otherwise. These defendants are claiming that the images they possess are not those of real children, insisting that the government prove beyond a reasonable doubt that the images are not computer-generated. This is not a new defense, but without a narrowly drafted statute intended to prohibit the use of virtual child pornography that an ordinary person viewing the depiction could not distinguish from a depiction of a real child, it may be impossible for the gov-

Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary, 107th Cong. (prepared statement of Dan Collins, Associate Deputy Attorney General, Department of Justice).

⁹*Hearing on the April 16, 2002 Supreme Court decision in Ashcroft v. the Free Speech Coalition Before the House Subcomm. Crime, Terrorism, and Homeland Security*, Comm. on the Judiciary, 107th Cong. (2002).

¹⁰Maro Robbins, *Doc must serve in porn case*, San Antonio Express-News, June 2002.

¹¹*Id.*

¹²*Id.*

¹³*Id.*

ernment to prosecute child pornography cases involving computer images.

The possibility that technology exists to produce depictions of virtual children identical to depictions of real children not only threatens the prosecution of current and future cases, but that of past cases. Compounding the problem that such technology exists is the fact that a computer image seized from a child pornographer is rarely a first-generation product. These pictures are e-mailed over and over again or scanned in from photographs of real children being abused and exploited. The transmission of images over an e-mail system can alter the image and make it impossible even for an expert to know whether or not a particular image depicts a real child. If the original image has been scanned from a paper version into a digital format, this task can be even harder since proper forensic delineation may depend on the quality of the image scanned and the tools used to scan it.

To prove a child is real will require identifying the actual child. This is usually impossible. Many of the victimized children are from third world countries.

Moreover, the existence of computer generated images of child pornography that are indistinguishable from depictions of real children will bolster the child pornography market and those who abuse children to produce such pictures. The majority opinion in *Free Speech Coalition* stated, in dicta, that “if virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes.”¹⁴ Contrary to that belief, the President and CEO of NCMEC “believe[s] that the Court’s decision will result in the proliferation of child pornography in America, unlike anything we have seen in more than twenty years.”¹⁵ He concluded that “as a result of the Court’s decision, thousands of children will be sexually victimized, most of whom will not report the offense.”¹⁶

The Court stated that “[f]ew pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.”¹⁷ This conclusion is simply wrong. The individuals who produce, trade, and exchange child pornography are rarely profit motivated. Pictures of real children being abused are sold, but they are also traded and displayed—they are trophies and signs of validation for deviant behavior. While the Supreme Court has certainly opened the door for the adult entertainment industry to enter the child pornography market, legalizing virtual child pornography will not reduce the market for real children.

Rather, the result will be a market that contains both real and virtual children (as it does now). The only difference is that now child molesters will be able to hide their abuse with altered or merely e-mailed photographs of their victims and the market will no longer be underground but will return to the public “adult book stores.”

¹⁴ 122 S.Ct. at 1404.

¹⁵ *Hearing on the April 16, 2002 Supreme Court decision in Ashcroft v. the Free Speech Coalition Before the House Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary*, 107th Cong. (2002) (prepared statement of Ernest E. Allen, President & Chief Executive Officer, National Center for Missing and Exploited Children).

¹⁶ *Id.*

¹⁷ *Free Speech Coalition*, 122 S.Ct. 1389, 1404 (2002).

Child pornography—virtual or otherwise—is detrimental to the nation’s most precious and vulnerable asset—our children. Regardless of the method of its production, child pornography is used to promote and incite deviant and dangerous behavior in our society. As the President and CEO of the NCMEC testified “there is compelling evidence that visual depictions of sexually explicit conduct involving children cause real physical, emotional and psychological damage not only to depicted children but also to non-depicted children. It is just as insidious, whether it is a photographic record of a child’s actual victimization, or a photographic depiction used as a tool or device to subsequently victimize other children.”¹⁸

Sex predators produce, trade, and use child pornography for several insidious purposes. Pedophiles not only like to create a permanent record for arousal and gratification, but also like to trade these pictures with other pedophiles to validate their actions. Additionally, sex offenders use child pornography to lower children’s inhibitions to make them believe that such behavior is acceptable and normal. There are also those who sell it for profit.¹⁹

Prior to 1982, child pornography lined the shelves of many “adult” entertainment stores. This changed after the 1982 Supreme Court’s *New York v. Ferber* decision that found child pornography was not entitled to First Amendment protection.²⁰ In *Ferber*, the Court found that: “[i]t is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’”²¹ Further the Court found that: “[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the material produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.”²²

While child pornography disappeared from bookstores following *Ferber*, it did not disappear from existence.²³ The child pornography market merely went underground, but this underground market was spurred by the advent of the Internet.²⁴ Nevertheless,

¹⁸Hearing on the April 16, 2002 Supreme Court decision in *Ashcroft v. the Free Speech Coalition Before the House Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary*, 107th Cong.(2002) (prepared statement of Ernest E. Allen, President & Chief Executive Officer, National Center for Missing and Exploited Children)

¹⁹Child Pornography: The Criminal-Justice-System Response, the American Bar Association Center for Children and the Law for the National Center for Missing & Exploited Children (March 2001) p.6.

²⁰458 U.S. at 764.

²¹*Id.* at 756–757(citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

²²*Id.* at 759.

²³Hearing on the April 16, 2002 Supreme Court decision in *Ashcroft v. the Free Speech Coalition Before the House Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary*, 107th Cong. (2002) (prepared statement of Ernest E. Allen, President & Chief Executive Officer, National Center for Missing and Exploited Children)

²⁴At a May 24, 2001 before the Subcommittee, the Deputy Attorney General for Criminal Justice of the State of Texas testimony (Unfortunately, one of the biggest problems is that computer criminals are targeting the most vulnerable of our society—children. While the Internet has revolutionized the ways in which the world communicates, there is an equally awesome dark side. According to the Federal Bureau of Investigation, child pornography was virtually extinct prior to the advent of the Internet. However, with increased Internet usage in America and the world there has been an alarming increase in child pornography cases. According to the U.S. Postal Service, 40 percent of the offenders who have been arrested with child pornography downloaded from the Internet have sexually assaulted minors.)

law enforcement had begun to make enormous strides in the enforcement and prosecution of child pornography crimes.²⁵

Again, the Government has a compelling interest in protecting children from those who sexually exploit them, including both child molesters and child pornographers. The Supreme Court in *New York v. Ferber*, concluded that “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.”²⁶ In *Osborne v. Ohio*, the Court recognized that this compelling state interest extends to stamping out the vice of child pornography “at all levels in the distribution chain.”²⁷

It follows that the Government has a compelling interest to ensure that the criminal prohibitions against child pornography remain enforceable and effective. As the Court stated in *Ferber*, “[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.”²⁸

It became apparent in the 1990’s that advances in technology threatened the Government’s compelling state interest in protecting real children through the effective prosecution of the child pornography laws that cover the visual depictions of real children. In 1996, the Congress attempted to address this concern with the Child Pornography Prevention Act.²⁹ The 1996 language included a prohibition of any virtual depictions as well as pictures of youthful-looking adults. The Supreme Court found the 1996 statutory language overbroad, and therefore, unconstitutional.

Unless we amend the statute, this Country faces a proliferation of child pornography. At risk are the prosecutions against child pornographers who are frequently child molesters.³⁰

In any criminal case, the prosecution must prove beyond a reasonable doubt that a crime was committed. A prosecutor would face an impossible burden if a distinction must be proved between vir-

²⁵Hearing on the April 16, 2002 Supreme Court decision in *Ashcroft v. the Free Speech Coalition Before the House Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary*, 107th Cong. (2002) (prepared statement of Ernest E. Allen, President & Chief Executive Officer, National Center for Missing and Exploited Children that, “The FBI created its Innocent Images Task Force. The Customs Service expanded its activities through its CyberSmuggling Center. The Postal Inspection Service continued and enhanced its strong attack on child pornography. The Congress funded thirty Internet Crimes Against Children Task Forces at the state and local levels across the country. Child pornography prosecutions have increased an average of 10% per year in every year since 1995.”)

²⁶458 U.S. at 757.

²⁷495 U.S. 103, 110 (1990)

²⁸458 U.S. at 760.

²⁹Pub. L. No. 104–208, Div. A, Title I, § 101(a), 110 Stat. 3009–28 (codified as amendment at 18 U.S.C. 2252A(1996)).

³⁰Andres E. Hernandex, Psy.D. Federal Bureau of Prisons, Self-Reported Contact Sexual Offenses by Participants in the Federal Bureau of Prisons’ Sex Offender Treatment Program: Implications for Internet Sex Offenders. (In November 2000, the Federal Bureau of Prisons released a study on Internet sex offenders who used the Internet to download, trade, and distribute child pornography as well as offenders who lure children for sexual abuse and exploitation. The study examined two groups: those convicted of sexual contact crimes against children and those convicted of nonsexual contact crimes against children. The nonsexual contact crimes consisted of those convicted under the child pornography laws and those convicted of traveling to meet a child with the intent to sexually exploit that child. Of the 90 subjects of the study 66 were convicted of crimes that did not include sexual contact. Out of the 66 who were convicted of non-contact crimes, 62 were still related to the sexual exploitation of children through child pornography or traveling to meet a child with the intent to sexually abuse a child. Of the 62, 49 were convicted of child pornography (trading or possessing child pornography) and 13 were convicted for traveling to meet a child. None of those convicted were producers of pornography. Of the 62 convictions for non-contact crimes against children, 76 percent of offenders admitted to sexually abusing or exploiting a child. These offenders admitted to an average of 30.5 victims per offender.)

tual child pornography, which may include parts of real children or be completely generated by a computer but indistinguishable from a real child, and child pornography that depicts an actual child or part of an actual child when the child is still identifiable.

The section-by-section analysis of this report describes in more detail how this legislation addresses the Supreme Court's concerns. Briefly, however, this legislation narrows the definition in significant ways and strengthens the affirmative defense. The Court gave the Congress an opportunity to address these concerns, and the Congress has an obligation to do so.

HEARINGS

The Committee's Subcommittee on Crime, Terrorism, and Homeland Security held 2 days of hearings on H.R. 4623. Testimony was received on May 1, 2002, from three witnesses: (1) Michael J. Heimbach, Unit Chief, Crimes Against Children Unit, Federal Bureau of Investigation; (2) Ernie Allen, President and Chief Executive Officer for the National Center for Missing & Exploited Children; and (3) Lt. Bill Walsh, with the Dallas Internet Crimes Against Children Taskforce. Testimony was received on May 9, 2002, from one witness: Daniel Collins, Associate Deputy Attorney General, Office of the Attorney General, U.S. Department of Justice.

COMMITTEE CONSIDERATION

On May 9, 2002, the Subcommittee on Crime, Terrorism, and Homeland Security met in open session and ordered favorably reported the bill H.R. 4623, as amended, a voice vote, a quorum being present. On May 15, 2002, the Committee met in open session and ordered favorably reported the bill H.R. 4623 with amendment by a recorded vote of 22 to 3, a quorum being present.

VOTE OF THE COMMITTEE

1. Final Passage. The motion to report favorably the bill H.R. 4623 was adopted. The motion was agreed to by rollcall vote of 22 to 3.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde			
Mr. Gekas	X		
Mr. Coble	X		
Mr. Smith (Texas)	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Barr			
Mr. Jenkins	X		
Mr. Cannon			
Mr. Graham	X		
Mr. Bachus			
Mr. Hostettler	X		
Mr. Green	X		
Mr. Keller	X		
Mr. Issa	X		
Ms. Hart	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Flake	X		
Mr. Pence	X		
Mr. Forbes	X		
Mr. Conyers			
Mr. Frank		X	
Mr. Berman			
Mr. Boucher			
Mr. Nadler			
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Ms. Baldwin	X		
Mr. Weiner			
Mr. Schiff	X		
Mr. Sensenbrenner, Chairman	X		
Total	22	3	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

PERFORMANCE GOALS AND OBJECTIVES

H.R. 4623 does not authorize funding. Therefore, clause 3(c) of rule XIII of the Rules of the House of Representatives is inapplicable.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 4623, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 24, 2002.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4623, the Child Obscenity and Pornography Prevention Act of 2002.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mark Grabowicz (for Federal costs), who can be reached at 226-2860, and Jean Talarico (for the private-sector impact), who can be reached at 226-2940.

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 4623—Child Obscenity and Pornography Prevention Act of 2002.

H.R. 4623 would establish new Federal crimes and increase penalties for existing crimes relating to child pornography. CBO estimates that implementing the bill would not result in any significant cost to the Federal Government. Because enactment of H.R. 4623 could affect direct spending and receipts, pay-as-you-go procedures would apply to the bill; however, CBO estimates that any impact on direct spending and receipts would not be significant.

Because H.R. 4623 would establish new Federal crimes, the Government would be able to pursue cases that it otherwise would not be able to prosecute. CBO estimates that any increase in costs for law enforcement, court proceedings, or prison operations would not be significant because of the small number of additional cases likely to be affected. Any such costs would be subject to the availability of appropriated funds.

Since those prosecuted and convicted under H.R. 4623 could be subject to criminal fines, the Federal Government might collect additional fines if the legislation is enacted. Collections of such fines are recorded in the budget as governmental receipts (revenues), which are deposited in the Crime Victims Fund and later spent. CBO expects that any additional receipts and direct spending would be negligible because of the small number of cases affected.

H.R. 4623 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on State, local, or tribal governments. The bill would impose a private-sector mandate, as defined in UMRA, by expanding reporting requirements on electronic communication service providers to include additional activities related to child pornography. Since those service providers are currently required to report many such activities violating the law, CBO estimates that the costs to report the additional activities would not exceed the annual threshold specified in UMRA (\$115 million in 2002, adjusted annually for inflation).

The CBO staff contacts for this estimate are Mark Grabowicz (for Federal costs), who can be reached at 226–2860, and Jean Talarico (for the private-sector impact), who can be reached at 226–2940. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article I, section 8 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

SEC. 1. SHORT TITLE.

The short title is the “Child Obscenity and Pornography Prevention Act of 2002.”

SEC. 2. FINDINGS

Congress finds the following:

- (1) Obscenity and child pornography are not entitled to protection under the First Amendment, and thus may be prohibited.
- (2) The Government has a compelling interest in protecting children from those who sexually exploit them, including both child molesters and child pornographers.
- (3) The Government thus has a compelling interest in ensuring that the criminal prohibitions against child pornography remain enforceable and effective.
- (4) In 1982, when the Supreme Court decided *New York v. Ferber*, 458 U.S. 747, technology did not exist to: (A) create depictions of virtual children that are indistinguishable from depictions of real children; (B) create depictions of virtual children using compositions of real children to create an unidentifiable child; or (C) disguise pictures of real children being abused by making the image look computer generated.
- (5) Evidence submitted to Congress demonstrates that today technology exists to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer generated. The technology will soon exist, if it does not already, to make depictions of virtual children look real.
- (6) The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and or related media.
- (7) There is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children. Nevertheless, technological advances since *Ferber* have led many criminal defendants to suggest that the images of child pornography they possess are not those of real children, insisting that the government prove beyond a reasonable doubt that the images are not computer generated. Such challenges will

likely increase after the *Ashcroft v. Free Speech Coalition* decision.

- (8) Child pornography circulating on the Internet has, by definition, been digitally uploaded or scanned into computers and has been transferred over the Internet, often in different file formats, from trafficker to trafficker. An image seized from a collector of child pornography is rarely a first-generation product, and the retransmission of images can alter the image so as to make it difficult for even an expert conclusively to opine that a particular image depicts a real child. If the original image has been scanned from a paper version into a digital format, this task can be even harder since proper forensic delineation may depend on the quality of the image scanned and the tools used to scan it.
- (9) The impact of the Government's ability to prosecute child pornography offenders is already evident. The Ninth Circuit has seen a significant adverse effect on prosecutions since the 1999 Ninth Circuit Court of Appeals decision in *Free Speech Coalition*. After that decision, prosecutions generally have been brought in the Ninth Circuit only in the most clear-cut cases in which the government can specifically identify the child in the depiction or otherwise identify the origin of the image. This is a fraction of meritorious child pornography cases. The National Center for Missing and Exploited Children testified that, in light of the Supreme Court's affirmation of the Ninth Circuit decision, prosecutors in various parts of the country have expressed concern about the continued viability of previously indicted cases as well as declined potentially meritorious prosecutions.
- (10) In the absence of congressional action, this problem will continue to grow increasingly worse. The mere prospect that the technology exists to create computer or computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution, for it threatens to create a reasonable doubt in every case of computer images even when a real child is abused. This threatens to render child pornography laws that protect real children unenforceable.
- (11) To avoid this grave threat to the Government's unquestioned compelling interest in effective enforcement of the child pornography laws that protect real children, a statute must be adopted that prohibits a narrowly-defined subcategory of images.
- (12) The Supreme Court's 1982 *Ferber v. New York* decision holding that child pornography was not protected by the First Amendment drove child pornography off the shelves of adult bookstores. Congressional action is necessary to ensure that open and notorious trafficking in such materials does not reappear.

SEC. 3. IMPROVEMENTS TO PROHIBITION ON VIRTUAL CHILD
PORNOGRAPHY.

Sections §§ 2251–2260 of title 18, United States Code, contains prohibitions against sexual exploitation of children including child pornography. Section 2251 makes it a Federal crime to use a minor to make child pornography if the pornography is connected to interstate or foreign commerce.

Section 2252 makes it a crime to knowingly (1) transport or ship child pornography; (2) receive or distribute child pornography; or (3) reproduce child pornography for distribution in interstate or foreign commerce by any means including by computer or through the mail. Additionally, § 2252 makes it a crime to possess child pornography.

In 1996, Congress amended the Federal prohibitions against sexual exploitation of children to address technological advances.³¹ These advances have assisted child pornographers in every aspect of the crime—from production to transmission to molestation. The Child Pornography Prevention Act of 1996,³² created new section 2252A of title 18. The prohibitions in § 2252A are basically the same as § 2252, but also include the use of a computer in the prohibitions against the production, distribution, and possession of “child pornography.” The Act also added a new definition of what constitutes child pornography under § 2256(8)(A)–(D).

On April 16, 2002, Supreme Court ruled that sections 2256(8)(B) and (D) were overbroad, and therefore unconstitutional.³³ This section narrows the definition for section 2256(8)(B) in three significant ways under sections 3(a)–(c) of the bill. Section 2256(8)(D) is addressed in section 4 of the bill.

Sec. 3(a)—tightening the definition of child pornography under § 2256(8)(B)

Section 3(a) of the bill amends 18 U.S.C. § 2256(8)(B), which currently defines “child pornography” to include “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture” that “is, or appears to be” of a minor engaging in sexually explicit conduct.

The Supreme Court held that the definition under § 2256(8)(B) was overbroad and unconstitutional because the statute extended the definition of child pornography to include visual depictions that were computer-generated and were of adults who looked like minors.³⁴ Because the statute covered adults and computer-generated images as well as real children, the Court found the statute went beyond *Ferber*.³⁵ The Court found in *Ferber* that child pornography was not entitled to First Amendment protection because of the State’s interest in protecting children.³⁶ The Court reasoned that “the use of [real] children as subjects of pornographic materials is

³¹ S. Rep. No. 104–358, at 7 (1996).

³² Child Pornography Prevention Act of 1996, Pub. L. No. 104–208, Div. A, Title I, § 101(a), 110 Stat. 3009–28. (codified as amendment at 18 U.S.C. 2252A(1996)).

³³ *Free Speech Coalition*, 122 S.Ct. 1389.

³⁴ *Free Speech Coalition*, 122 S.Ct. 1389 (2002).

³⁵ *Id.*

³⁶ 458 U.S. 747 (1982).

harmful to the physiological, emotional, and mental health of the child.”³⁷

In response to the *Free Speech Coalition* decision, section 3(a) of this bill narrows the definition of child pornography so that “[it] is a computer image or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct.”

This provision narrows the definition in several ways. First, it limits the definition to computer images or computer-generated images. Second, it limits the definition by requiring the virtual images be indistinguishable from real images. Third, it uses the newly defined definition for “sexually explicit conduct.”

✓ **LIMITING THE DEFINITION TO COMPUTER IMAGES OR COMPUTER GENERATED IMAGES**

Section 3(a) of the bill narrows the definition of child pornography under section 2256(8)(B) to depictions that are “computer images” (e.g., pictures scanned into a computer) or “computer-generated images” (e.g., images created or altered with the use of a computer). The Supreme Court was concerned in *Free Speech Coalition* that the breadth of the language would prohibit legitimate movies like “Traffic” or plays like “Romeo and Juliet.” Limiting the definition to computer images or computer-generated images will help to exclude ordinary motion pictures from the coverage of “virtual child pornography.”

✓ **LIMITING THE DEFINITION BY REQUIRING THE VIRTUAL IMAGES TO BE INDISTINGUISHABLE FROM REAL IMAGES.**

This section further narrows the definition by replacing the phrase “appears to be” with the phrase “is indistinguishable from.” That new phrase addresses the Court’s concern that cartoon-sketches would be banned under the statute. “The substitution of ‘is indistinguishable from’ in lieu of ‘appears to be’ more precisely reflects what Congress intended to cover in the first instance, and eliminates an ambiguity that infected the current version of the definition and that enabled those challenging the statute to argue that it ‘capture[d] even cartoon-sketches and statues of children that were sexually suggestive.’”³⁸

The term “indistinguishable” is defined in subsection 4(c) of the bill and provides that “indistinguishable” means “virtually indistinguishable, in that the depiction is such that an ordinary person viewing it would conclude the depiction is of a minor engaged in sexually explicit conduct.” To clear up any ambiguity the bill further limits the definition of “indistinguishable” by clarifying that this definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.

✓ **LIMITING THE DEFINITION OF CHILD PORNOGRAPHY BY NARROWING THE DEFINITION OF “SEXUALLY EXPLICIT CONDUCT”**

³⁷ *Id.* at 758.

³⁸ Department of Justice Transmittal letter with draft legislation to the Speaker of the House at 3 (May 2002), citing *Free Speech Coalition* 122 S. Ct. at 1409 (O’Connor, J., concurring in part and dissenting in part).

The bill further narrows the definition of child pornography through an amendment to 18 U.S.C. § 2256(2) that requires a simulated image to be lascivious to constitute child pornography under the new definition in 2256(8)(B). Thus, child pornography that simulates sexually explicit conduct must be lascivious as well as meet the other requirement of the definition.

Sec. 3(b)—tightening the definition of “sexually explicit conduct” as it applies to virtual child pornography.

As mentioned above, subsection (b) attempts to further tighten the definition of child pornography under § 2256(8)(B) by amending § 2256(2) that defines “sexually explicit conduct.” The amendment adds a new section creating a separate definition of “sexually explicit conduct” for child pornography under § 2256(8)(B).

That new section of the definition covers both real and simulated conduct as does the old criminal code provision. The difference, however, is that the new section requires “simulated” conduct to be lascivious.

Sec. 3(c)—strengthening the affirmative defense under 18 U.S.C. § 2252A

The Supreme Court did not rule on the affirmative defense in § 2252A(c), which provides a defense for violations of subsections 2252A(a)(1)–(4) where the person producing the material used adults and did not distribute the material so as to convey the impression that the material was child pornography.

Subsection 3(c) amends the existing statutory provision in the code to conform with the Supreme Court’s holding by replacing 18 U.S.C. § 2252A(c), the affirmative defense for violations of § 2252A, with a statement that it shall be an affirmative defense to a charge of violating this section that the alleged offense did not involve the use of a minor engaging in sexually explicit conduct or attempt to or conspire to commit an offense involving such child pornography. Unlike the current law, this defense applies to possession as well as the other crimes under section 2252A.

The affirmative defense would only apply when the production of the visual depiction did not involve a minor. Additionally, while this defense applies to the child pornography section, it would not apply to the old or new obscenity provisions. Accordingly, the defense only applies when no real child was used and when the materials are not obscene. Producers, distributors, and possessors may still be charged and convicted with obscenity charges under Chapter 71 of title 18, United States Code, including the new violations under sections 1466A and 1466B.

The committee finds that section 3(c) strengthens the affirmative defense in existing law. If the existing affirmative defense had been more complete, the Court left open the possibility that the 1996 statute might have survived the constitutional challenge, even though it was overbroad. Specifically, the Court stated “We need not decide, however, whether the Government could impose this burden [of an affirmative defense] on a speaker. Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own

terms.”³⁹ Justice Thomas, in his concurring opinion, stated that the “Court does leave open the possibility that a more complete affirmative defense could save a statute’s constitutionality.”⁴⁰ The Committee believes that such an opening by the Court was an implicit acceptance that some regulation of virtual child pornography might be constitutional.

SEC. 4. PROHIBITION ON PANDERING MATERIALS AS CHILD PORNOGRAPHY.

This section amends the law to address the Court’s conclusion that 18 U.S.C. §2256(8)(D) is overbroad and unconstitutional. That section defined “child pornography” to include “any visual depiction, including any photography, film, video, picture, or computer or computer-generated image or picture” that “is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.”

The Court found that this part of the definition of child pornography was overbroad because it punishes even those possessors who took no part in pandering and may not even have been aware that it was once so pandered as child pornography.

Sec. 4(a)—eliminating subparagraph (D) in § 2256(8) for the definition of child pornography.

Section 4(a) of the bill deletes § 2256(8)(D) in the definition of “child pornography,” which the Supreme Court found unconstitutional.⁴¹ The Court found this prohibition as overbroad because it punishes even those possessors who took no part in pandering. “Once a work has been described as child pornography, the taint remains on the speech in the hands of subsequent possessors, making possession unlawful even though the content otherwise would not be objectionable.”⁴²

Sec. 4(b)—creating two new offenses for pandering related to child pornography.

Section 4(b) adds a new section 2252B to title 18. This new section of title 18 provides two new offenses related to child pornography. Section 2252B(a) makes it an offense for a person who offers, agrees, attempts, or conspires to provide or sell a visual depiction to another, and who in connection therewith knowingly advertises, promotes, presents, or describes the visual depiction with the intent to cause any persons to believe that the material is a visual depiction of a minor engaging in sexually explicit conduct. This section makes it illegal for anyone to pander material they are offering as child pornography.

Section 2252B(b) makes it an offense for a person who offers, agrees, attempts, or conspires to receive or purchase from another person a visual depiction that he believes to be, or to contain, a visual depiction of a minor engaging in sexually explicit conduct.

Section 2252B(c) provides that the offense does not require the element of actually providing, selling, receiving, purchasing, pos-

³⁹ *Free Speech Coalition*, 122 S.Ct. at 1405.

⁴⁰ *Free Speech Coalition*, 122 S.Ct. at 1407. (Thomas, J., concurring).

⁴¹ *Free Speech Coalition*, 122 S.Ct. 1397.

⁴² *Id.* at 1398.

sessing, or producing any visual depiction. Section 2252(d) provides the circumstances for which Federal jurisdiction would apply.

The Committee agrees with the Department of Justice's position that this new section should resolve the constitutional problems with the definition under section 2256(8)(D) as this section deals with inchoate offenses (i.e., attempt, conspiracy, solicitation) with respect to conduct that is aimed at other unlawful conduct that is not constitutionally protected and with the prohibition of advertising of an unlawful transaction. An analogy the Department of Justice presented is the example of criminalizing an individual offering to provide or sell illegal drugs, even where the offeror does not actually have such drugs in hand.⁴³

SEC. 5. PROHIBITION OF OBSCENITY DEPICTING YOUNG CHILDREN.

In addition to responding directly to the Court's constitutional concerns, this bill adds new obscenity offenses by adding two new sections in Chapter 71 of title 18. Section 5 of the bill would add new § 1466A entitled *Obscene visual depictions of young children* and new § 1466B entitled *Obscene visual representations of pre-pubescent sexual abuse*. The Court found that the definition of child pornography under the Federal statute went beyond speech that was obscene.

This more narrowly focused section "takes into account the fact that the *Free Speech Coalition* Court relied entirely on *post-pubescent* materials in finding that the prior law was substantially overbroad."⁴⁴ "Moreover, the Court specifically noted in its opinion that the age of the child depicted was an important consideration in determining whether a particular depiction was constitutionally unprotected obscenity: 'Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not'."⁴⁵

Section 5 creates a narrowly focused prohibition that responds to the Court's *dicta*. Obscene materials are not protected by the Constitution and may be banned. An official of the Department of Justice testified before the Subcommittee on May 9, 2002, that:

Congress may reasonably conclude that the very narrow class of materials covered by the new section [5] are the sort that would *invariably* satisfy the constitutional standards for obscenity set out in *Miller v. California*, 413 U.S. 15 (1973), and that such materials therefore may be fully proscribed because they are constitutionally unprotected obscenity. The narrow class of images reached by section [5] are precisely the sort that appeal to the worst form of prurient interest, that are patently offensive in light of any applicable community standards,

⁴³ Department of Justice Transmittal letter with draft legislation to the Speaker of the House at 4 (May 2002) (citing *Cf. Ginzburg v. United States*, 383 U.S. 463, 474-76 (1966) (materials can be characterized as obscene based in part on the manner in which they are marketed)).

⁴⁴ Legislative Hearing on H.R. 4623, the "Child Obscenity and Pornography Prevention Act of 2002," and H.R. 4477, the "Sex Tourism Prohibition Improvement Act of 2002," Before the House Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary, 107th Cong. 8 (statement of Dan Collins, Associate Deputy Attorney General, Department of Justice).

⁴⁵ Legislative Hearing on H.R. 4623, the "Child Obscenity and Pornography Prevention Act of 2002," and H.R. 4477, the "Sex Tourism Prohibition Improvement Act of 2002," Before the House Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary, 107th Cong. 7-8 (statement of Dan Collins, Associate Deputy Attorney General, Department of Justice) (quoting *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389, 1396 (2002)).

and that lack serious literary, artistic, political, or scientific value in virtually any context.⁴⁶

An offense under these new sections are subject to a higher penalty than the existing penalties under Federal obscenity prohibitions, as the offense deals directly with the child pornography market.

Section 1466A(a) would prohibit a person from producing, distributing, receiving, or possessing with the intent to distribute, a visual depiction that is, or is nearly indistinguishable, from a pre-pubescent child as a violation of Federal obscenity law. Pre-pubescent child is defined in new § 1466A(c).

Because section 1466A(a) covers depictions of pre-pubescent children, the prohibition is narrower than the concept of “child pornography” under chapter 110 of title 18. Child pornography covers visual depictions of persons below the age of 18.

Section 1466A(b) prohibits the possession of obscene pre-pubescent visual depictions. Although this is an obscenity provision that prohibits possession, the Department of Justice’s position is that this provision is constitutionally sound:

In 1969, the Supreme Court held in *Stanley v. Georgia*, 394 U.S. 557 (1969), that a state could not constitutionally criminalize the simple possession of obscenity in the privacy of a person’s residence. In *Osborne v. Ohio*, 495 U.S. 103 (1990), however, the Court held that *Stanley* does not apply to the possession of child pornography involving actual children. *Id.* at 108–11. Moreover, the Court has explicitly “rejected” the contention “that *Stanley* has firmly established the right to possess obscene material in the privacy of the home and that this creates a correlative right to receive it, transport it, or distribute it.” *United States v. Orito*, 413 U.S. 139, 141 (1973). See also *Smith v. United States*, 431 U.S. 291, 307 (1977) (“The [*Orito* Court] held that *Stanley* did not create a right to receive, transport, or distribute obscene material, even though it had established the right to possess the material in the privacy of the home.”⁴⁷

The Department of Justice’s position points to the fact that several “Courts of appeals have extended the rationale of *Orito*⁴⁸ to, in effect, cover such ‘home receipt’ situations under several [F]ederal obscenity and child pornography laws.”⁴⁹ The Committee agrees with the Department of Justice.

⁴⁶Legislative Hearing on H.R. 4623, the “Child Obscenity and Pornography Prevention Act of 2002,” and H.R. 4477, the “Sex Tourism Prohibition Improvement Act of 2002,” Before the House Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary, 107th Cong. 8 (statement of Dan Collins, Associate Deputy Attorney General, Department of Justice)

⁴⁷Department of Justice Transmittal letter with draft legislation to the Speaker of the House at 5 (May 2002) (emphasis added).

⁴⁸*United States v. Orito*, 413 U.S. 139, 141 (1973).

⁴⁹Department of Justice Transmittal letter with draft legislation to the Speaker of the House at 5–6 (May 2002) (citing *See, e.g., United States v. Hurt*, 795 F.2d 765 (9th Cir. 1986), cert. denied, 484 U.S. 816 (1987); *United States v. Kuennen*, 901 F.2d 103 (8th Cir.), cert. denied, 498 U.S. 958 (1990); *United States v. Hale*, 784 F.2d 1465 (9th Cir.), cert. denied, 479 U.S. 829 (1986); see also, *e.g., United States v. Andersson*, 803 F.2d 903, 906–07 (7th Cir. 1986), cert. denied, 479 U.S. 1069 (1987); *United States v. Mercado*, 828 F.2d 20, 1987 WL 38588, at *2 (6th Cir. 1987), cert. denied, 485 U.S. 907 (1988); *United States v. Nelson*, 847 F.2d 285, 288 (6th Cir. 1988); *United States v. Dornhofer*, 859 F.2d 1195, 1199 (4th Cir. 1988), cert. denied, 490 U.S. 1005 (1989); *United States v. Fordyce*, 878 F.2d 1431, 1989 WL 74900, at *1 [sic] (4th Cir. 1989) (per curiam)).

The Department concluded that “the new 1466A(b) will not depart from current constitutional doctrine in any material respect.”⁵⁰ While child pornography does not have to be obscene,⁵¹ any obscene picture of real children engaging in sexually explicit conduct is by its very definition child pornography. There is no right to possess child pornography in one’s home;⁵² thus, the ban on possession of visual depictions of pre-pubescent children engaging in sexually explicit conduct is constitutional.

The extension of the ban on possession of obscene visual depictions that are indistinguishable from that of a real pre-pubescent child would be, in all likelihood, computer-generated images. If it is a computer-generated image, the possessor either produced it in violation of 1466A(a) or received it in violation of 1466A(a). As the Department of Justice indicated:

the possession prohibition in section 1466A(b) would not be premised “on the desirability of controlling a person’s private thoughts.” Stanley, 394 U.S. at 566. Instead, it would be premised on the government’s substantial and legitimate interest in preventing obscenity from “entering the stream of commerce” in the first instance, *see Orito*, 413 U.S. at 143, and on the reasonable assumption that a defendant’s possession of computer-generated obscenity is fairly dispositive proof that the defendant caused, induced, or effected, the interstate transmission or commerce of the obscene materials (e.g., by ordering or requesting their transmission).⁵³

Section 1466A(c) provides the definitions for “visual depiction,” “pre-pubescent child,” and “sexual explicit conduct.” Section 1466A(d) provides the circumstances for which Federal jurisdiction would apply.

Section 1466A(e) incorporates an affirmative defense similar to the existing defense in 18 U.S.C. § 2252A(d) which applies to situations where someone comes into possession of one or two items of child pornography (e.g., through spammed material) and promptly destroys the material or notifies law enforcement.

Section 5(a) also includes a new obscenity provision, 1466B that applies to obscene visual representations of pre-pubescent sexual abuse. This section applies to depictions of virtual children that are distinguishable from real children. This new section was added during Full Committee consideration in response to what appears to be a newly posted web site that displays pictures of children being raped and sodomized by adults, where the pictures are clearly virtual, but obscene. This provision would enhance the penalties for such obscenity.

The Committee believes that this web site was clearly created in response to the Supreme Court’s *Free Speech Coalition* decision. The site proudly states that it is there for “whetting the appetites of pedophiles everywhere.” The website goes on to state that:

⁵⁰ Department of Justice Transmittal letter with draft legislation to the Speaker of the House at 6 (May 2002).

⁵¹ *Ferber*, 458 U.S. at 764 (1982) (“The Miller formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct be portrayed in a patently offensive manner; and the material need not be considered as a whole.”)

⁵² *Osborne v. Ohio*, 495 U.S. 103 (1990).

⁵³ Department of Justice Transmittal letter with draft legislation to the Speaker of the House at 6 (May 2002).

On April 16, 2002, in a 6–3 decision (*Ashcroft v. Free Speech Coalition*), the Supreme Court struck down the two sections of the 1996 Child Pornography Prevention Act that forbid virtual child pornography, stating that these sections were overbroad and unconstitutional. Well, here we go. . . .

Virtual Child Porn Headquarters:

The first and only source for virtual child porn Here at Virtual Child Porn Headquarters, we strive to be a source you can trust for the best in virtual child pornography. With the law by our side, we are embarking on a marvelous journey, exploring the very frontiers of *your rights as a[sic] American*. And as you stand proudly next to us, fellow citizen, you can recite our motto to boost your morale:

Give me virtual child pornography, or give me death!

Section 5(b) of this bill directs that the Sentencing Commission may establish guidelines specifically governing offenses under 18 U.S.C. §§ 1466A and 1466B.

SEC. 6. PROHIBITION ON USE OF MATERIALS TO FACILITATE OFFENSES AGAINST MINORS

Section 6 of the bill would add new § 1471 entitled “*Use of obscene material or child pornography to facilitate offenses against minors*.” Section 1471 would (1) punish adults who provide unsuitable materials to children and (2) punish adults who do so to aid in the solicitation of minors for sexual exploitation.

Among other things, sex offenders use visual depictions of children having sex with adults or performing sexual acts to lower the inhibitions of children to engage in sex with the pedophile. “Child pornography is not used simply for the viewing pleasure of an individual, it is also used as a means to an end—that end being the victimization of children and in some cases the end of a child’s life.”⁵⁴ The Supreme Court stated that “[t]he government, of course, may punish adults who provide unsuitable materials to children.”⁵⁵ The Court mentioned that “*Osborne* also noted that the State’s interest in preventing child pornography from being used as an aid in the solicitation of minors.”⁵⁶

Section 1471(a)(1) would prohibit providing or showing to a person below the age of 16 years any obscene material or child pornography.

Section 1471(a)(2) would prohibit providing a person below the age of 16 years any obscene materials or child pornography to participate in any conduct that violates chapter 109A (relating to sexual abuse), 110 (relating to sexual exploitation of children), or 117 (relating to transportation for illegal sexual activity and related crimes). This provision includes language prohibiting attempts, incitements, solicitations, or conspiracy to engage in any of the prohibited conduct.

⁵⁴*Hearing on the April 16, 2002 Supreme Court decision in Ashcroft v. the Free Speech Coalition Before the House Subcomm. on Crime, Terrorism, and Homeland Security, Comm. on the Judiciary, 107th Cong. (2002)* (prepared statement of Ernest E. Allen, President & Chief Executive Officer, National Center for Missing and Exploited Children).

⁵⁵*Free Speech Coalition*, 122 S.Ct. at 1402 (citing *Ginsberg v. New York*, 390 U.S. 629 (1968)).

⁵⁶*Id.* at 1401 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 91969)(*per curiam*).

SEC. 7. EXTRATERRITORIAL PRODUCTION OF CHILD PORNOGRAPHY FOR DISTRIBUTION IN THE UNITED STATES.

This section adds a new subparagraph to 18 U.S.C. § 2251 to prohibit a person from producing child pornography outside of the United States with the intent to transport it to the United States, or does transport it into (or otherwise makes it available in) the United States after that person has produced it outside the United States. The purpose of this section is to stop efforts by producers of child pornography to avoid criminal liability based on the fact that the child pornography was produced outside of the United States.⁵⁷

SEC. 8. STRENGTHENING ENHANCED PENALTIES FOR REPEAT OFFENDERS

This section amends chapter 110, the child pornography chapter of title 18, which provides enhanced penalties for recidivists in that chapter as well as chapters 109A (related to sexual abuse) and 117 (related transportation for illegal sexual activity and related crimes) to include the offenses under the obscenity chapter, chapter 71. Recidivism is a huge problem in sexual exploitation cases. This amendment addresses this problem by enhancing the penalties for repeat offenders and ensuring adequate penalties for recidivists who commit the offenses under the new chapter 71 provisions in this bill.

SEC. 9. SERVICE PROVIDER REPORTING OF CHILD PORNOGRAPHY AND RELATED INFORMATION.

This section amends 42 U.S.C. § 13032 which requires providers of electronic communications and remote computing services to report apparent offenses that involve child pornography. Under the current law, communications providers must report to the National Center for Missing and Exploited Children (NCMEC) when the provider obtains knowledge of facts or circumstances from which a violation of sexual exploitation crimes against children.⁵⁸ A provider of electronic communication services may be fined for knowingly and willfully failing to make a report.⁵⁹ Federal criminal law provides that “[n]o provider or user of an electronic communication service or a remote computing service to the public shall be held liable on account of any action taken in good faith to comply with this section.”⁶⁰

After receiving these reports from communication providers, the NCMEC must forward them to law enforcement agencies that are designated by the Attorney General.

This section of the bill strengthens this reporting system by adding the new offenses under §§ 2252B, 1466A and 1466B.

Section 9(b) amends 18 U.S.C. § 2702 to be consistent with 42 U.S.C. 13032(d), which provides that, in addition to the required information that is reported to NCMEC, the reports may include “additional information.” This should make it clear, for example, that an Internet service provider can disclose the identity of a sub-

⁵⁷ See, e.g., *United States v. Thomas*, 893 F. 2d 1066 (9th Cir. 1990).

⁵⁸ 42 U.S.C. § 13032(b)(1).

⁵⁹ 42 U.S.C. § 13032(b)(3).

⁶⁰ 42 U.S.C. § 13032(c).

scriber who sent a message containing child pornography, in addition to the required reporting of the contents of such a communication. However, the corresponding provisions in 18 U.S.C. § 2702(b)(6)(B) only authorize disclosure of content information required by 42 U.S.C. § 13032, and contains no language which appears to cover relevant non-content information, such as the identity of the sender of the child pornography in the example described above. This section corrects that inconsistency.

At the request of the NCMEC the amendment includes a provision to fix a deficiency in the current law that will not allow the Federally funded Internet Crimes Against Children Task Forces to receive reports from the Cyber Tipline. These Task Forces are state and local police agencies that have been identified by the National Center as competent to investigate and prosecute computer facilitated crimes against children.

Only the designated Federal agencies—FBI and Customs—are authorized to receive direct access to these reports. Since the 9–11 attacks, the resources of the FBI have been stretched in a way which does not optimize the overall ability of law enforcement to effectively deal with the volume of cases being sent by the National Center for Missing and Exploited Children.

The proposed language would authorize Internet Crimes Against Children Task Forces access to the Cyber Tipline Reports. The vast majority of cases in this area are being investigated and prosecuted by state and local law enforcement.

SEC 10. SEVERABILITY.

This section provides that the provisions of the bill are severable, if any part is found to be unconstitutional.

SEC. 11. INVESTIGATIVE AUTHORITY RELATING TO CHILD PORNOGRAPHY.

This section is technical in nature. This section updates the current law regarding the use of administrative subpoenas. Section 3486 of title 18 covers administrative subpoenas. Recent changes to the law updated the transactional information that may be obtained under section 2703(c)(2) through an administrative subpoena. To update § 3486, which covers subpoenas issued involving the sexual exploitation or abuse of children, this provision inserts the information specified in section 2703(c)(2) for the list of transactional information in § 3486. Transactional information includes billing records and other similar records.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

* * * * *

PART I—CRIMES

* * * * *

CHAPTER 71—OBSCENITY

Sec.	
1460.	Possession with intent to sell, and sale, of obscene matter on Federal property.
	* * * * *
1466A.	<i>Obscene visual depictions of young children.</i>
1466B.	<i>Obscene visual representations of pre-pubescent sexual abuse.</i>
	* * * * *
1471.	<i>Use of obscene material or child pornography to facilitate offenses against minors.</i>
	* * * * *

§ 1466A. Obscene visual depictions of young children

(a) Whoever, in a circumstance described in subsection (d), knowingly produces, distributes, receives, or possesses with intent to distribute a visual depiction that is, or is indistinguishable from, that of a pre-pubescent child engaging in sexually explicit conduct, or attempts or conspires to do so, shall be subject to the penalties set forth in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction.

(b) Whoever, in a circumstance described in subsection (d), knowingly possesses a visual depiction that is, or is indistinguishable from, that of a pre-pubescent child engaging in sexually explicit conduct, or attempts or conspires to do so, shall be subject to the penalties set forth in section 2252A(b)(2), including the penalties provided for cases involving a prior conviction.

(c) For purposes of this section—

(1) the term “visual depiction” includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image, and also includes any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means;

(2) the term “pre-pubescent child” means that (A) the child, as depicted, is one whose physical development indicates the child is 12 years of age or younger; or (B) the child, as depicted, does not exhibit significant pubescent physical or sexual maturation. Factors that may be considered in determining significant pubescent physical maturation include body habitus and musculature, height and weight proportion, degree of hair distribution over the body, extremity proportion with respect to the torso, and dentition. Factors that may be considered in determining significant pubescent sexual maturation include breast development, presence of axillary hair, pubic hair distribution, and visible growth of the sexual organs;

(3) the term “sexually explicit conduct” has the meaning set forth in section 2256(2); and

(4) the term “indistinguishable” used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in

sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.

(d) The circumstance referred to in subsections (a) and (b) is that—

(1) any communication involved in or made in furtherance of the offense is communicated or transported by the mail, or in interstate or foreign commerce by any means, including by computer, or any means or instrumentality of interstate or foreign commerce is otherwise used in committing or in furtherance of the commission of the offense;

(2) any communication involved in or made in furtherance of the offense contemplates the transmission or transportation of a visual depiction by the mail, or in interstate or foreign commerce by any means, including by computer;

(3) any person travels or is transported in interstate or foreign commerce in the course of the commission or in furtherance of the commission of the offense;

(4) any visual depiction involved in the offense has been mailed, or has been shipped or transported in interstate or foreign commerce by any means, including by computer, or was produced using materials that have been mailed, or that have been shipped or transported in interstate or foreign commerce by any means, including by computer; or

(5) the offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.

(e) In a case under subsection (b), it is an affirmative defense that the defendant—

(1) possessed less than three such images; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof—

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

§ 1466B. Obscene visual representations of pre-pubescent sexual abuse

(a) Whoever, in a circumstance described in subsection (e), knowingly produces, distributes, receives, or possesses with intent to distribute a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that—

(1) depicts a pre-pubescent child engaging in sexually explicit conduct, and

(2) is obscene, or who attempts or conspires to do so, shall be subject to the penalties set forth in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction.

(b) Whoever, in a circumstance described in subsection (e), knowingly possesses a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that—

(1) depicts a pre-pubescent child engaging in sexually explicit conduct, and

(2) is obscene,

or who attempts or conspires to do so, shall be subject to the penalties set forth in section 2252A(b)(2), including the penalties provided for cases involving a prior conviction.

(c) It is not a required element of any offense under this section that the pre-pubescent child depicted actually exist.

(d) For purposes of this section, the terms “visual depiction” and “pre-pubescent child” have respectively the meanings given those terms in section 1466A, and the term “sexually explicit conduct” has the meaning given that term in section 2256(2)(B).

(e) The circumstance referred to in subsection (a) and (b) is that—

(1) any communication involved in or made in furtherance of the offense is communicated or transported by the mail, or in interstate or foreign commerce by any means, including by computer, or any means or instrumentality of interstate or foreign commerce is otherwise used in committing or in furtherance of the commission of the offense;

(2) any communication involved in or made in furtherance of the offense contemplates the transmission or transportation of a visual depiction by the mail, or in interstate or foreign commerce by any means, including by computer;

(3) any person travels or is transported in interstate or foreign commerce in the course of the commission or in furtherance of the commission of the offense;

(4) any visual depiction involved in the offense has been mailed, or has been shipped or transported in interstate or foreign commerce by any means, including by computer, or was produced using materials that have been mailed, or that have been shipped or transported in interstate or foreign commerce by any means, including by computer; or

(5) the offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.

(f) In a case under subsection (b), it is an affirmative defense that the defendant—

(1) possessed less than three such images; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof—

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

* * * * *

§1471. Use of obscene material or child pornography to facilitate offenses against minors

(a) Whoever, in any circumstance described in subsection (c), knowingly—

(1) provides or shows to a person below the age of 16 years any visual depiction that is, or is indistinguishable from, that of a pre-pubescent child engaging in sexually explicit conduct, any obscene matter, or any child pornography; or

(2) provides or shows any obscene matter or child pornography, or any visual depiction that is, or is indistinguishable from, that of a pre-pubescent child engaging in sexually explicit

conduct, or any other material assistance to any person in connection with any conduct, or any attempt, incitement, solicitation, or conspiracy to engage in any conduct, that involves a minor and that violates chapter 109A, 110, or 117, or that would violate chapter 109A if the conduct occurred in the special maritime and territorial jurisdiction of the United States, shall be subject to the penalties set forth in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction.

(b) For purposes of this section—

(1) the term “child pornography” has the meaning set forth in section 2256(8);

(2) the terms “visual depiction”, “pre-pubescent child”, and “indistinguishable” have the meanings respectively set forth for those terms in section 1466A(c); and

(3) the term “sexually explicit conduct” has the meaning set forth in section 2256(2).

(c) The circumstance referred to in subsection (a) is that—

(1) any communication involved in or made in furtherance of the offense is communicated or transported by the mail, or in interstate or foreign commerce by any means, including by computer, or any means or instrumentality of interstate or foreign commerce is otherwise used in committing or in furtherance of the commission of the offense;

(2) any communication involved in or made in furtherance of the offense contemplates the transmission or transportation of a visual depiction or obscene matter by the mail, or in interstate or foreign commerce by any means, including by computer;

(3) any person travels or is transported in interstate or foreign commerce in the course of the commission or in furtherance of the commission of the offense;

(4) any visual depiction or obscene matter involved in the offense has been mailed, or has been shipped or transported in interstate or foreign commerce by any means, including by computer, or was produced using materials that have been mailed, or that have been shipped or transported in interstate or foreign commerce by any means, including by computer; or

(5) the offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.

* * * * *

CHAPTER 110—SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN

Sec.
2251. Sexual exploitation of children.

* * * * *

2252B. Pandering and solicitation.

* * * * *

§ 2251. Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the

United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under **[(subsection (d)) subsection (e)]** *subsection (e)*, if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished as provided under **[(subsection (d)) subsection (e)]** *subsection (e)* of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(c)(1) Any person who, in a circumstance described in paragraph (2), employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct outside of the United States, its possessions and Territories, for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that—

(A) the person intends such visual depiction to be transported to the United States, its possessions, or territories, by any means including by computer or mail;

(B) the person transports such visual depiction to, or otherwise makes it available within, the United States, its possessions, or territories, by any means including by computer or mail.

[(c)] (d)(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct;

shall be punished as provided under **[(subsection (d)) subsection (e)]** *subsection (e)*.

(2) The circumstance referred to in paragraph (1) is that—

(A) such person knows or has reason to know that such notice or advertisement will be transported in interstate or foreign commerce by any means including by computer or mailed; or

(B) such notice or advertisement is transported in interstate or foreign commerce by any means including by computer or mailed.

[(d)] (e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title or imprisoned not less than 10 years nor more than 20 years, and both, but if such person has one prior conviction under this chapter, *chapter 71*, chapter 109A, or chapter 117, or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 30 years, but if such person has 2 or more prior convictions under this chapter, *chapter 71*, chapter 109A, or chapter 117, or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 30 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for any term of years or for life.

* * * * *

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) * * *

(b)(1) Whoever violates, or attempts or conspires to violate, paragraphs (1), (2), or (3) of subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, but if such person has a prior conviction under this chapter, *chapter 71*, chapter 109A, or chapter 117, or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.

(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 5 years, or both, but if such person has a prior conviction under this chapter, *chapter 71*, chapter 109A, or chapter 117, or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.

* * * * *

§ 2252A. Certain activities relating to material constituting or containing child pornography

(a) * * *

(b)(1) Whoever violates, or attempts or conspires to violate, paragraphs (1), (2), (3), or (4) of subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, but, if such person has a prior conviction under this chapter, *chapter 71*,

chapter 109A, or chapter 117, or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 5 years, or both, but, if such person has a prior conviction under this chapter, *chapter 71*, chapter 109A, or chapter 117, or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.

[(c) It shall be an affirmative defense to a charge of violating paragraphs (1), (2), (3), or (4) of subsection (a) that—

[(1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;

[(2) each such person was an adult at the time the material was produced; and

[(3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.]]

(c)(1) Except as provided in paragraph (2), it shall be an affirmative defense to a charge of violating this section that the alleged offense did not involve the use of a minor or an attempt or conspiracy to commit an offense under this section involving such use.

(2) A violation of, or an attempt or conspiracy to violate, this section which involves child pornography as defined in section 2256(8)(A) or (C) shall be punishable without regard to the affirmative defense set forth in paragraph (1).

* * * * *

§ 2252B. Pandering and solicitation

(a) Whoever, in a circumstance described in subsection (d), offers, agrees, attempts, or conspires to provide or sell a visual depiction to another, and who in connection therewith knowingly advertises, promotes, presents, or describes the visual depiction with the intent to cause any person to believe that the material is, or contains, a visual depiction of a minor engaging in sexually explicit conduct shall be subject to the penalties set forth in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction.

(b) Whoever, in a circumstance described in subsection (d), offers, agrees, attempts, or conspires to receive or purchase from another a visual depiction that he believes to be, or to contain, a visual depiction of a minor engaging in sexually explicit conduct shall be subject to the penalties set forth in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction.

(c) *It is not a required element of any offense under this section that any person actually provide, sell, receive, purchase, possess, or produce any visual depiction.*

(d) *The circumstance referred to in subsection (a) and (b) is that—*

(1) any communication involved in or made in furtherance of the offense is communicated or transported by the mail, or in interstate or foreign commerce by any means, including by computer, or any means or instrumentality of interstate or foreign commerce is otherwise used in committing or in furtherance of the commission of the offense;

(2) any communication involved in or made in furtherance of the offense contemplates the transmission or transportation of a visual depiction by the mail, or in interstate or foreign commerce by any means, including by computer;

(3) any person travels or is transported in interstate or foreign commerce in the course of the commission or in furtherance of the commission of the offense;

(4) any visual depiction involved in the offense has been mailed, or has been shipped or transported in interstate or foreign commerce by any means, including by computer, or was produced using materials that have been mailed, or that have been shipped or transported in interstate or foreign commerce by any means, including by computer; or

(5) the offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.

* * * * *

§ 2256. Definitions for chapter

For the purposes of this chapter, the term—

(1) * * *

[(2) “sexually explicit conduct” means actual or simulated—

[(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

[(B) bestiality;

[(C) masturbation;

[(D) sadistic or masochistic abuse; or

[(E) lascivious exhibition of the genitals or pubic area of any person;]

(2)(A) *Except as provided in subparagraph (B), “sexually explicit conduct” means actual or simulated—*

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the genitals or pubic area of any person;

(B) For purposes of subsection 8(B) of this section, “sexually explicit conduct” means—

(i) *actual sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;*

(ii) *actual or lascivious simulated;*

(I) *bestiality;*

(II) *masturbation; or*

(III) *sadistic or masochistic abuse; or*

(iii) *actual or simulated lascivious exhibition of the genitals or pubic area of any person;*

* * * * *

(8) “child pornography” means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

【(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;】

(B) *such visual depiction is a computer image or computer-generated image that is, or is indistinguishable (as defined in section 1466A) from, that of a minor engaging in sexually explicit conduct; or*

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; 【or】 *and*

【(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct; and】

* * * * *

CHAPTER 121—STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

* * * * *

§ 2702. Voluntary disclosure of customer communications or records

(a) * * *

(b) EXCEPTIONS FOR DISCLOSURE OF COMMUNICATIONS.— A provider described in subsection (a) may divulge the contents of a communication—

(1) * * *

* * * * *

(5) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service; 【or】

(6) *to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under sec-*

tion 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032); or

[(6)] (7) to a law enforcement agency—

(A) if the contents—

(i) were inadvertently obtained by the service provider; and

(ii) appear to pertain to the commission of a crime;

or

[(B)] if required by section 227 of the Crime Control Act of 1990; or]

[(C)] (B) if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.

(c) EXCEPTIONS FOR DISCLOSURE OF CUSTOMER RECORDS.—A provider described in subsection (a) may divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a)(1) or (a)(2))—

(1) * * *

* * * * *

(4) to a governmental entity, if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person justifies disclosure of the information; [or]

(5) *to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032); or*

[(5)] (6) to any person other than a governmental entity.

* * * * *

CHAPTER 223—WITNESSES AND EVIDENCE

* * * * *

§ 3486. Administrative subpoenas

(a) AUTHORIZATION.—(1)(A) * * *

* * * * *

(C) A subpoena issued under subparagraph (A) with respect to a provider of electronic communication service or remote computing service, in an investigation of a Federal offense involving the sexual exploitation or abuse of children shall not extend beyond—

(i) requiring that provider to disclose [the name, address, local and long distance telephone toll billing records, telephone number or other subscriber number or identity, and length of service of a subscriber to or customer of such service and the types of services the subscriber or customer] *the information specified in section 2703(c)(2) utilized, which may be relevant to an authorized law enforcement inquiry; or*

* * * * *

**SECTION 227 OF THE VICTIMS OF CHILD ABUSE ACT OF
1990**

**SEC. 227. REPORTING OF CHILD PORNOGRAPHY BY ELECTRONIC
COMMUNICATION SERVICE PROVIDERS.**

(a) * * *

(b) REQUIREMENTS.—

(1) DUTY TO REPORT.—Whoever, while engaged in providing an electronic communication service or a remote computing service to the public, through a facility or means of interstate or foreign commerce, obtains knowledge of facts or circumstances from which a violation of section 2251, 2251A, 2252, 2252A, 2252B, or 2260 of title 18, United States Code, involving child pornography (as defined in section 2256 of that title), *or a violation of section 1466A or 1466B of that title*, is apparent, shall, as soon as reasonably possible, make a report of such facts or circumstances to the Cyber Tip Line at the National Center for Missing and Exploited Children, which shall forward that report to a law enforcement agency or agencies designated by the Attorney General.

* * * * *

(3) In addition to forwarding such reports to those agencies designated in subsection (b)(2), the National Center for Missing and Exploited Children is authorized to forward any such report to an appropriate official of a state or subdivision of a state for the purpose of enforcing state criminal law.

[(3)] (4) FAILURE TO REPORT.—A provider of electronic communication services or remote computing services described in paragraph (1) who knowingly and willfully fails to make a report under that paragraph shall be fined—

(A) * * *

* * * * *

(c) CIVIL LIABILITY.—No provider or user of an electronic communication service or a remote computing service to the public shall be held liable on account of any action taken in good faith to comply with *or pursuant to* this section.

* * * * *

(f) CONDITIONS OF DISCLOSURE OF INFORMATION CONTAINED
WITHIN REPORT.—

(1) IN GENERAL.—No law enforcement agency that receives a report under subsection (b)(1) shall disclose any information contained in that report, except that disclosure of such information may be made—

(A) * * *

* * * * *

[(D)] as permitted by a court at the request of an attorney for the government, upon a showing that such information may disclose a violation of State criminal law, to an appropriate official of a State or subdivision of a State for the purpose of enforcing such State law.】

(D) where the report discloses a violation of State criminal law, to an appropriate official of a State or sub-

division of a State for the purpose of enforcing such State law.

* * * * *

MARKUP TRANSCRIPT

BUSINESS MEETING

TUESDAY, JUNE 18, 2002

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:06 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will be in order.

[Intervening business.]

The next item on the agenda is H.R. 4623, the “Child Obscenity and Pornography Prevention Act of 2002.”

Chairman SENSENBRENNER. The Chair recognizes the gentleman from Texas, Mr. Smith, the Chairman of the Subcommittee on Crime, Terrorism, and Homeland Security, for a motion.

Mr. SMITH. Mr. Chairman, the Subcommittee on Crime, Terrorism, and Homeland Security reports favorably to bill H.R. 4623 with a single amendment in the nature of a substitute, and moves its favorable recommendation to the full House.

[The amendment follows:]

**SUBCOMMITTEE AMENDMENT IN THE NATURE OF
A SUBSTITUTE TO H.R. 4623
[ORDERED REPORTED 9 MAY 2002]**

Strike all after the enacting clause and insert the following:

1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the “Child Obscenity and
3 Pornography Prevention Act of 2002”.

**4 SEC. 2. IMPROVEMENTS TO PROHIBITION ON VIRTUAL
5 CHILD PORNOGRAPHY.**

6 (a) Section 2256(8)(B) of title 18, United States
7 Code, is amended to read as follows:

8 “(B) such visual depiction is a computer
9 image or computer-generated image that is, or
10 is nearly indistinguishable (as defined in section
11 1466A) from, that of a minor engaging in sexu-
12 ally explicit conduct; or”.

13 (b) Section 2256(2) of title 18, United States Code,
14 is amended to read as follows:

15 “(2)(A) Except as provided in subparagraph
16 (B), ‘sexually explicit conduct’ means actual or
17 simulated—

18 “(i) sexual intercourse, including genital-
19 genital, oral-genital, anal-genital, or oral-anal,

1 whether between persons of the same or oppo-
2 site sex;

3 “(ii) bestiality;

4 “(iii) masturbation;

5 “(iv) sadistic or masochistic abuse; or

6 “(v) lascivious exhibition of the genitals or
7 pubic area of any person;

8 “(B) For purposes of subsection 8(B) of this
9 section, ‘sexually explicit conduct’ means—

10 “(i) actual sexual intercourse, including
11 genital-genital, oral-genital, anal-genital, or
12 oral-anal, whether between persons of the same
13 or opposite sex, or lascivious simulated sexual
14 intercourse where the genitals, breast, or pubic
15 area of any person is exhibited;

16 “(ii) actual or lascivious simulated;

17 “(I) bestiality;

18 “(II) masturbation; or

19 “(III) sadistic or masochistic abuse;

20 or

21 “(iii) actual or simulated lascivious exhi-
22 bition of the genitals or pubic area of any per-
23 son;”.

24 (c) Section 2252A(c) of title 18, United States Code,
25 is amended to read as follows:

1 “(c)(1) Except as provided in paragraph (2), it shall
2 be an affirmative defense to a charge of violating this sec-
3 tion that the alleged offense did not involve the use of a
4 minor or an attempt or conspiracy to commit an offense
5 under this section involving such use.

6 “(2) A violation of, or an attempt or conspiracy to
7 violate, this section which involves child pornography as
8 defined in section 2256(8)(A) or (C) shall be punishable
9 without regard to the affirmative defense set forth in para-
10 graph (1).”.

11 **SEC. 3. PROHIBITION ON PANDERING MATERIALS AS**
12 **CHILD PORNOGRAPHY.**

13 (a) Section 2256(8) of title 18, United States Code,
14 is amended—

15 (1) by inserting “or” at the end of subpara-
16 graph (B);

17 (2) in subparagraph (C), by striking “or” at
18 the end and inserting “and”; and

19 (3) by striking subparagraph (D).

20 (b) Chapter 110 of title 18, United States Code, is
21 amended—

22 (1) by inserting after section 2252A the fol-
23 lowing:

1 **“§ 2252B. Pandering and solicitation**

2 “(a) Whoever, in a circumstance described in sub-
3 section (d), offers, agrees, attempts, or conspires to pro-
4 vide or sell a visual depiction to another, and who in con-
5 nection therewith knowingly advertises, promotes, pre-
6 sents, or describes the visual depiction with the intent to
7 cause any person to believe that the material is, or con-
8 tains, a visual depiction of a minor engaging in sexually
9 explicit conduct shall be subject to the penalties set forth
10 in section 2252A(b)(1), including the penalties provided
11 for cases involving a prior conviction.

12 “(b) Whoever, in a circumstance described in sub-
13 section (d), offers, agrees, attempts, or conspires to receive
14 or purchase from another a visual depiction that he be-
15 lieves to be, or to contain, a visual depiction of a minor
16 engaging in sexually explicit conduct shall be subject to
17 the penalties set forth in section 2252A(b)(1), including
18 the penalties provided for cases involving a prior convic-
19 tion.

20 “(c) It is not a required element of any offense under
21 this section that any person actually provide, sell, receive,
22 purchase, possess, or produce any visual depiction.

23 “(d) The circumstance referred to in subsection (a)
24 and (b) is that—

25 “(1) any communication involved in or made in
26 furtherance of the offense is communicated or trans-

1 ported by the mail, or in interstate or foreign com-
2 merce by any means, including by computer, or any
3 means or instrumentality of interstate or foreign
4 commerce is otherwise used in committing or in fur-
5 therance of the commission of the offense;

6 “(2) any communication involved in or made in
7 furtherance of the offense contemplates the trans-
8 mission or transportation of a visual depiction by the
9 mail, or in interstate or foreign commerce by any
10 means, including by computer;

11 “(3) any person travels or is transported in
12 interstate or foreign commerce in the course of the
13 commission or in furtherance of the commission of
14 the offense;

15 “(4) any visual depiction involved in the offense
16 has been mailed, or has been shipped or transported
17 in interstate or foreign commerce by any means, in-
18 cluding by computer, or was produced using mate-
19 rials that have been mailed, or that have been
20 shipped or transported in interstate or foreign com-
21 merce by any means, including by computer; or

22 “(5) the offense is committed in the special
23 maritime and territorial jurisdiction of the United
24 States or in any territory or possession of the
25 United States.”;

1 (2) in the analysis for the chapter, by inserting
2 after the item relating to section 2252A the fol-
3 lowing:

“2252B. Pandering and solicitation.”.

4 **SEC. 4. PROHIBITION OF OBSCENITY DEPICTING YOUNG**
5 **CHILDREN.**

6 (a) Chapter 71 of title 18, United States Code, is
7 amended—

8 (1) by inserting after section 1466 the fol-
9 lowing:

10 **“§ 1466A. Obscene visual depictions of young children**

11 “(a) Whoever, in a circumstance described in sub-
12 section (d), knowingly produces, distributes, receives, or
13 possesses with intent to distribute a visual depiction that
14 is, or is nearly indistinguishable from, that of a pre-pubes-
15 cent child engaging in sexually explicit conduct, or at-
16 tempts or conspires to do so, shall be subject to the pen-
17 alties set forth in section 2252A(b)(1), including the pen-
18 alties provided for cases involving a prior conviction.

19 “(b) Whoever, in a circumstance described in sub-
20 section (d), knowingly possesses a visual depiction that is,
21 or is nearly indistinguishable from, that of a pre-pubescent
22 child engaging in sexually explicit conduct, or attempts or
23 conspires to do so, shall be subject to the penalties set
24 forth in section 2252A(b)(2), including the penalties pro-
25 vided for cases involving a prior conviction.

1 “(c) For purposes of this section—

2 “(1) the term ‘visual depiction’ includes unde-
3 veloped film and videotape, and data stored on com-
4 puter disk or by electronic means which is capable
5 of conversion into a visual image, and also includes
6 any photograph, film, video, picture, or computer or
7 computer-generated image or picture, whether made
8 or produced by electronic, mechanical, or other
9 means;

10 “(2) the term ‘pre-pubescent child’ means that
11 the child, as depicted, does not exhibit significant
12 pubescent physical or sexual maturation. Factors
13 that may be considered in determining significant
14 pubescent physical maturation include body habitus
15 and musculature, height and weight proportion, de-
16 gree of hair distribution over the body, extremity
17 proportion with respect to the torso, and dentition.
18 Factors that may be considered in determining sig-
19 nificant pubescent sexual maturation include breast
20 development, presence of axillary hair, pubic hair
21 distribution, and visible growth of the sexual organs;

22 “(3) the term ‘sexually explicit conduct’ has the
23 meaning set forth in section 2256(2); and

24 “(4) the term ‘nearly indistinguishable’ used
25 with respect to a depiction, means virtually indistin-

1 guishable, in that the depiction is such that an ordi-
2 nary person viewing the depiction would conclude
3 that the depiction is of a minor engaged in sexually
4 explicit conduct.

5 “(d) The circumstance referred to in subsections (a)
6 and (b) is that—

7 “(1) any communication involved in or made in
8 furtherance of the offense is communicated or trans-
9 ported by the mail, or in interstate or foreign com-
10 merce by any means, including by computer, or any
11 means or instrumentality of interstate or foreign
12 commerce is otherwise used in committing or in fur-
13 therance of the commission of the offense;

14 “(2) any communication involved in or made in
15 furtherance of the offense contemplates the trans-
16 mission or transportation of a visual depiction by the
17 mail, or in interstate or foreign commerce by any
18 means, including by computer;

19 “(3) any person travels or is transported in
20 interstate or foreign commerce in the course of the
21 commission or in furtherance of the commission of
22 the offense;

23 “(4) any visual depiction involved in the offense
24 has been mailed, or has been shipped or transported
25 in interstate or foreign commerce by any means, in-

1 cluding by computer, or was produced using mate-
2 rials that have been mailed, or that have been
3 shipped or transported in interstate or foreign com-
4 merce by any means, including by computer; or

5 “(5) the offense is committed in the special
6 maritime and territorial jurisdiction of the United
7 States or in any territory or possession of the
8 United States.

9 “(e) In a case under subsection (b), it is an affirma-
10 tive defense that the defendant—

11 “(1) possessed less than three such images; and

12 “(2) promptly and in good faith, and without
13 retaining or allowing any person, other than a law
14 enforcement agency, to access any image or copy
15 thereof—

16 “(A) took reasonable steps to destroy each
17 such image; or

18 “(B) reported the matter to a law enforce-
19 ment agency and afforded that agency access to
20 each such image.”; and

21 (2) in the analysis for the chapter, by inserting
22 after the item relating to section 1466 the following:

“1466A. Obscene visual depictions of young children.”.

23 (b)(1) Except as provided in paragraph (2), the appli-
24 cable category of offense to be used in determining the
25 sentencing range referred to in section 3553(a)(4) of title

1 18, United States Code, with respect to any person con-
2 victed under section 1466A of such title, shall be the cat-
3 egory of offenses described in section 2G2.2 of the Sen-
4 tencing Guidelines.

5 (2) The Sentencing Commission may promulgate
6 guidelines specifically governing offenses under section
7 1466A of title 18, United States Code, provided that such
8 guidelines shall not result in sentencing ranges that are
9 lower than those that would have applied under paragraph
10 (1).

11 **SEC. 5. PROHIBITION ON USE OF MATERIALS TO FACILI-**
12 **TATE OFFENSES AGAINST MINORS.**

13 Chapter 71 of title 18, United States Code, is
14 amended—

15 (1) by inserting at the end the following:

16 **“§1471. Use of obscene material or child pornog-**
17 **raphy to facilitate offenses against mi-**
18 **nors**

19 “(a) Whoever, in any circumstance described in sub-
20 section (c), knowingly—

21 “(1) provides or shows to a person below the
22 age of 16 years any visual depiction that is, or is
23 nearly indistinguishable from, that of a pre-pubes-
24 cent child engaging in sexually explicit conduct, any
25 obscene matter, or any child pornography; or

1 “(2) provides or shows any obscene matter or
2 child pornography, or any visual depiction that is, or
3 is nearly indistinguishable from, that of a pre-pubes-
4 cent child engaging in sexually explicit conduct, or
5 any other material assistance to any person in con-
6 nection with any conduct, or any attempt, incite-
7 ment, solicitation, or conspiracy to engage in any
8 conduct, that involves a minor and that violates
9 chapter 109A, 110, or 117, or that would violate
10 chapter 109A if the conduct occurred in the special
11 maritime and territorial jurisdiction of the United
12 States,
13 shall be subject to the penalties set forth in section
14 2252A(b)(1), including the penalties provided for cases in-
15 volving a prior conviction.

16 “(b) For purposes of this section—

17 “(1) the term ‘child pornography’ has the
18 meaning set forth in section 2256(8);

19 “(2) the terms ‘visual depiction’, ‘pre-pubescent
20 child’, and ‘nearly indistinguishable’ have the mean-
21 ings respectively set forth for those terms in section
22 1466A(c); and

23 “(3) the term ‘sexually explicit conduct’ has the
24 meaning set forth in section 2256(2).

1 “(c) The circumstance referred to in subsection (a)
2 is that—

3 “(1) any communication involved in or made in
4 furtherance of the offense is communicated or trans-
5 ported by the mail, or in interstate or foreign com-
6 merce by any means, including by computer, or any
7 means or instrumentality of interstate or foreign
8 commerce is otherwise used in committing or in fur-
9 therance of the commission of the offense;

10 “(2) any communication involved in or made in
11 furtherance of the offense contemplates the trans-
12 mission or transportation of a visual depiction or ob-
13 scene matter by the mail, or in interstate or foreign
14 commerce by any means, including by computer;

15 “(3) any person travels or is transported in
16 interstate or foreign commerce in the course of the
17 commission or in furtherance of the commission of
18 the offense;

19 “(4) any visual depiction or obscene matter in-
20 volved in the offense has been mailed, or has been
21 shipped or transported in interstate or foreign com-
22 merce by any means, including by computer, or was
23 produced using materials that have been mailed, or
24 that have been shipped or transported in interstate

1 or foreign commerce by any means, including by
2 computer; or

3 “(5) the offense is committed in the special
4 maritime and territorial jurisdiction of the United
5 States or in any territory or possession of the
6 United States.”;

7 (2) in the analysis for the chapter, by inserting
8 at the end the following:

“1471. Use of obscene material or child pornography to facilitate offenses
against minors.”.

9 **SEC. 6. EXTRATERRITORIAL PRODUCTION OF CHILD POR-**
10 **NOGRAPHY FOR DISTRIBUTION IN THE**
11 **UNITED STATES.**

12 Section 2251 is amended—

13 (1) by striking “subsection (d)” each place it
14 appears in subsections (a), (b), and (c) and inserting
15 “subsection (e)”;

16 (2) by redesignating subsections (c) and (d), re-
17 spectively, as subsections (d) and (e); and

18 (3) by inserting after subsection (b) a new sub-
19 section (c) as follows:

20 “(c)(1) Any person who, in a circumstance described
21 in paragraph (2), employs, uses, persuades, induces, en-
22 tices, or coerces any minor to engage in, or who has a
23 minor assist any other person to engage in, any sexually
24 explicit conduct outside of the United States, its posses-

1 sions and Territories, for the purpose of producing any
2 visual depiction of such conduct, shall be punished as pro-
3 vided under subsection (e).

4 “(2) The circumstance referred to in paragraph (1)
5 is that—

6 “(A) the person intends such visual depiction to
7 be transported to the United States, its possessions,
8 or territories, by any means including by computer
9 or mail;

10 “(B) the person transports such visual depic-
11 tion to, or otherwise makes it available within, the
12 United States, its possessions, or territories, by any
13 means including by computer or mail.”.

14 **SEC. 7. STRENGTHENING ENHANCED PENALTIES FOR RE-**
15 **PEAT OFFENDERS.**

16 Sections 2251(d), 2252(b), and 2252A(b) of title 18,
17 United States Code, are each amended by inserting “chap-
18 ter 71,” immediately before each occurrence of “chapter
19 109A,”.

20 **SEC. 8. SERVICE PROVIDER REPORTING OF CHILD POR-**
21 **NOGRAPHY AND RELATED INFORMATION.**

22 (a) Section 227 of the Victims of Child Abuse Act
23 of 1990 (42 U.S.C. 13032) is amended—

24 (1) in subsection (b)(1)—

1 (A) by inserting “2252B,” after “2252A,”;
2 and

3 (B) by inserting “or a violation of section
4 1466A of that title,” after “of that title),”;

5 (2) in subsection (c), by inserting “or pursuant
6 to” after “to comply with”;

7 (3) in subsection (d)—

8 (A) by striking the heading and inserting
9 the following new heading: “Voluntary provision
10 of information by service providers”;

11 (B) by designating the current text of sub-
12 section (d) as paragraph (1); and

13 (C) by adding at the end of subsection (d)
14 the following new paragraph:

15 “(2) A provider of electronic communication
16 services or remote computing services described in
17 subsection (b)(1), which reasonably believes that it
18 has obtained knowledge of facts and circumstances
19 indicating that a violation of section 2251, 2251A,
20 2252, 2252A, 2252B, or 2260 of title 18, involving
21 child pornography (as defined in section 2256 of
22 that title), or a violation of section 1466A of that
23 title, may have occurred or will occur, may make a
24 report of such facts or circumstances to the Cyber
25 Tip Line at the National Center for Missing and Ex-

1 ploited Children, which shall forward that report to
2 the law enforcement agency or agencies previously
3 designated by the Attorney General under subsection
4 (b)(2). Except as provided in subsection (b)(1), the
5 Federal Government may not require the making of
6 any such report.”; and

7 (4) by amending subsection (f)(1)(D) to read as
8 follows:

9 “(D) where the report discloses a violation
10 of State criminal law, to an appropriate official
11 of a State or subdivision of a State for the pur-
12 pose of enforcing such State law.”.

13 (b) Section 2702 of title 18, United States Code is
14 amended—

15 (1) in subsection (b)—

16 (A) in paragraph (6)—

17 (i) by inserting “or” at the end of
18 subparagraph (A)(ii);

19 (ii) by striking subparagraph (B); and

20 (iii) by redesignating subparagraph
21 (C) as subparagraph (B);

22 (B) by redesignating paragraph (6) as
23 paragraph (7);

24 (C) by striking “or” at the end of para-
25 graph (5); and

1 (D) by inserting after paragraph (5) the
2 following new paragraph:

3 “(6) to the National Center for Missing and
4 Exploited Children, in connection with a report sub-
5 mitted thereto under section 227 of the Victims of
6 Child Abuse Act of 1990 (42 U.S.C. 13032); or”;
7 and

8 (2) in subsection (c)—

9 (A) by striking “or” at the end of para-
10 graph (4);

11 (B) by redesignating paragraph (5) as
12 paragraph (6); and

13 (C) by adding after paragraph (4) the fol-
14 lowing new paragraph:

15 “(5) to the National Center for Missing and
16 Exploited Children, in connection with a report sub-
17 mitted thereto under section 227 of the Victims of
18 Child Abuse Act of 1990 (42 U.S.C. 13032); or”.

Chairman SENSENBRENNER. Without objection, the bill will be considered as read and open for amendment at any point, and the Subcommittee amendment in the nature of a substitute, which Members have before them, will be considered as read, considered as the original text for purposes of amendment, and open for amendment at any point.

The Chair recognizes the gentleman from Texas, Mr. Smith, to strike the last word.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Chairman, child pornography and obscenity are not protected speech under the Constitution and therefore may be prohibited by the Government. In addition, where there is a compelling Government interest to do so, the Government may prohibit speech that would otherwise be protected if the prohibition is narrowly drawn to meet that compelling need.

The Government has a compelling interest in protecting children from those who exploit them. The Supreme Court of *New York v. Ferber* concluded that, "The prevention of sexual exploitation and abuse of children constitutes a Government objective of surpassing the importance," and that this compelling State interest extends to stamping out the vice of child pornography, "at all levels in the distribution chain."

The Supreme Court further stated in *Ferber*, "The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising or otherwise promoting the product."

The technological advances since *Ferber* have led many criminal defendants to insist that the images of child pornography they possess are not those of real children, forcing the Government to prove beyond a reasonable doubt that the images are depictions of real children.

Child pornography circulating on the Internet has, by definition, been digitally uploaded or scanned into computers and has been transferred over the Internet, often in different file formats from trafficker to trafficker. An image seized from a child pornographer is rarely a first generation product, and the retransmission of images can alter the image so as to make it impossible, even for when expert to testify, whether or not a particular image depicts a real child. The 1996 statutory language included any virtual depiction, and included pictures of youthful-looking adults. Thus the Supreme Court found to be overbroad.

H.R. 4623, the "Child Obscenity and Pornography Prevention Act of 2002" is a bipartisan bill that responds to the *Ashcroft v. Free Speech Coalition* Supreme Court decision. The bill narrows the definition of child pornography so as to meet the Government's compelling interest in a constitutionally-accepted way. The negative impact of *Free Speech Coalition* on the Government's ability to prosecute child pornographers is already evident. The National Center for Missing and Exploited Children testified that prosecutors nationwide have dismissed previously indicted cases as well as declined meritorious prosecutions in light of the Supreme Court's recent affirmation of the Ninth Circuit decision. In the absence of congressional action, this problem will continue to grow increasingly worse.

A website that states it is, “whetting the appetites of pedophiles everywhere,” recently posted information on the ruling and announced, “We strive to be a source you can trust for the best in virtual child pornography. With the law by our side, we are embarking on a marvelous journey, exploring the very frontiers of your rights as an American, and as you stand proudly next to us, fellow citizen, you can recite our motto to boost your morale: give me virtual pornography or give me death.”

The mere existence of computer-generated depictions that are indistinguishable from depictions of real children allows defendants who possess either real or virtual depictions to escape prosecution. And that, Mr. Chairman is why we need this bill.

I’ll yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, sexual abuse of children, child pornography, including obscene computer-generated child pornography and other sex-related crimes against children are serious crimes that warrant prosecution and punishment. Such crimes and their punishments were left intact by the Supreme Court decision in *Ashcroft v. Free Speech Coalition*, issued just a few weeks ago on April 16th. What the Court struck down was the criminalization of computer-generated and other depictions of children in undesirable but not obscene situations where no child was actually involved in making of the material.

Mr. Chairman, the Supreme Court has ruled that a computer-generated depiction of a child, including the image of a teenager or other child engaged in sexually explicit activity is not an image—that is not an image of a real child, is protected speech. While such a depiction may be deplorable, the Court made it clear through several decisions that the right to free speech cannot be denied simply because some find the speech deplorable. The computer-generated depiction of a child that is not a real child is essentially no different than the 22-year-old who looks—plays the role of a 15-year-old engaged in a sex scene in a movie such as we recently saw and was cited in the Supreme Court decision, “American Beauty” and “Traffic.” Neither image is that of a real minor. Both involved an expression of ideas and thoughts that many find upsetting.

The law called into question in *Ashcroft* is the Child Pornography Prevention Act of 1996, the CPPA. The problem the Court found with the law is that while it prohibited images that constitute child pornography, it also prohibited speech that may have serious literary, artistic, political or scientific value. As currently formed, it would be applied to a picture in a psychological manual, as well as a movie depicting the horrors of sexual abuse. The conduct and expression that the CPPA was aimed at preventing is essentially—is certainly despicable and unlawful, but the Court made it clear that protected speech may not be banned as a means to ban unprotected speech, which would turn the First Amendment upside down. The Court said the Government may not suppress lawful speech as a means of suppressing unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.

So, Mr. Chairman, whether you agree with the decision or not, the Court ruled just a few weeks ago. And I will offer an amendment at the appropriate time aimed at having the bill conform to that decision.

Thank you, Mr. Chairman. Yield back.

Chairman SENSENBRENNER. Without objection, Member opening statements will appear in the record at this time.

Are there amendments?

Mr. SMITH. Mr. Chairman?

Chairman SENSENBRENNER. Gentleman from Texas.

Mr. SMITH. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to the Subcommittee amendment in the nature of a substitute to H.R. 4623, offered by Mr. Smith of Texas. "Insert after section 1 the following: Section 2. Findings. Congress finds the following"——

Chairman SENSENBRENNER. Without objection, the amendment will be considered as read, and the gentleman from Texas is recognized for 5 minutes.

[The amendment follows:]

**AMENDMENT TO THE SUBCOMMITTEE AMEND-
MENT IN THE NATURE OF A SUBSTITUTE TO
H.R. 4623**

OFFERED BY

Insert after section 1 the following:

1 **SEC. 2. FINDINGS.**

2 Congress finds the following:

3 (1) Obscenity and child pornography are not
4 entitled to protection under the First Amendment
5 under *Miller v. California*, 413 U.S. 15 (1973) (ob-
6 scenity), or *New York v. Ferber*, 458 U.S. 747
7 (1982) (child pornography) and thus may be prohib-
8 ited. ~~Even otherwise protected speech may be regu-~~
9 ~~lated pursuant to a statute that is narrowly drawn~~
10 ~~to promote a compelling Government interest.~~
11 ~~United States v. Playboy Entertainment Group, 529~~
12 ~~U.S. 803, 813 (2000).~~ *deleted by U.C.*

13 (2) The Government has a compelling state in-
14 terest in protecting children from those who sexually
15 exploit them, including both child molesters and
16 child pornographers. "The prevention of sexual ex-
17 ploitation and abuse of children constitutes a gov-
18 ernment objective of surpassing importance," *New*
19 *York v. Ferber*, 458 U.S. 747, 757 (1982) (empha-

1 sis added), and this interest extends to stamping out
2 the vice of child pornography at all levels in the dis-
3 tribution chain. *Osborne v. Ohio*, 495 U.S. 103, 110
4 (1990).

5 (3) The Government thus has a compelling in-
6 terest in ensuring that the criminal prohibitions
7 against child pornography remain enforceable and
8 effective. “[T]he most expeditious if not the only
9 practical method of law enforcement may be to dry
10 up the market for this material by imposing severe
11 criminal penalties on persons selling, advertising, or
12 otherwise promoting the product.” *Ferber*, 458 U.S.
13 at 760.

14 (4) In 1982, when the Supreme Court decided
15 *Ferber*, the technology did not exist to: (A) create
16 depictions of virtual children that are indistinguish-
17 able from depictions of real children; (B) create de-
18 pictions of virtual children using compositions of real
19 children to create an unidentifiable child; or (C) dis-
20 guise pictures of real children being abused by mak-
21 ing the image look computer generated.

22 (5) Evidence submitted to the Congress, includ-
23 ing from the National Center for Missing and Ex-
24 ploited Children, demonstrates that technology is
25 available today that: (A) allows child pornographers

1 to create depictions of virtual children that an ordi-
2 nary person viewing the depictions could not distin-
3 guish from real children; (B) allows child pornog-
4 raphers to disguise depictions of real children to look
5 like a computer-generated pictures; and (C) allows
6 child pornographers to disguise depictions of real
7 children to make those children unidentifiable.

8 (6) The vast majority of child pornography
9 prosecutions today involve images contained on com-
10 puter hard drives, computer disks, and/or related
11 media.

12 (7) The technological advances since Ferber
13 have led many criminal defendants to suggest that
14 the images of child pornography they possess are not
15 those of real children, insisting that the government
16 prove beyond a reasonable doubt that the images are
17 not computer-generated. Such challenges will likely
18 increase after the Ashcroft v. Free Speech Coalition.

19 (8) Child pornography circulating on the Inter-
20 net has, by definition, been digitally uploaded or
21 scanned into computers and has been transferred
22 over the Internet, often in different file formats,
23 from trafficker to trafficker. An image seized from
24 a collector of child pornography is rarely a first-gen-
25 eration product, and the retransmission of images

1 can alter the image so as to make it impossible for
2 even an expert conclusively to opine that a particular
3 image depicts a real child. If the original image has
4 been scanned from a paper version into a digital for-
5 mat, this task can be even harder since proper fo-
6 rensic delineation may depend on the quality of the
7 image scanned and the tools used to scan it.

8 (9) The dramatic impact on the government's
9 ability to prosecute child pornography offenders is
10 already evident. The Ninth Circuit has seen a sig-
11 nificant adverse effect on prosecutions since the
12 1999 Ninth Circuit Court of Appeals decision in
13 Free Speech Coalition. After that decision, prosecu-
14 tions generally have been brought in the Ninth Cir-
15 cuit only in the most clear-cut cases in which the
16 government can specifically identify the child in the
17 depiction or otherwise identify the origin of the
18 image. This is a fraction of meritorious child por-
19 nography cases. The National Center for Missing
20 and Exploited Children testified that, in light of the
21 Supreme Court's affirmation of the Ninth Circuit
22 decision, prosecutors in various parts of the country
23 have expressed concern about the continued viability
24 of previously indicted cases as well as declined po-
25 tentially meritorious prosecutions.

1 (10) In the absence of congressional action, this
2 problem will continue to grow increasingly worse.
3 The mere existence of computer or computer-gen-
4 erated depictions that are indistinguishable from de-
5 pictions of real children will allow defendants who
6 possess either to escape prosecution, for it threatens
7 to create a reasonable doubt in every case of com-
8 puter or computer-generated depictions even when a
9 real child is abused. This threatens to render child
10 pornography laws that protect real children unen-
11 forceable.

12 (11) To avoid this grave threat to the Govern-
13 ment's unquestioned compelling interest in effective
14 enforcement of the child pornography laws that pro-
15 tect real children, a statute must be adopted that
16 prohibits a narrowly-defined subcategory of images,^u
17 ~~which would otherwise constitute protected speech.~~
18 That subcategory is, computer or computer-gen-
19 erated images that are indistinguishable from im-
20 ages of real children engaged in sexually explicit
21 ~~conduct.~~ *deleted by U.C.*

22 (12) The Supreme Court's 1982 *Ferber v. New*
23 York decision holding that child pornography was
24 not protected drove child pornography off the shelves
25 of adult bookstores. Congressional action is nec-

- 1 essary to ensure that open and notorious trafficking
- 2 in such materials does not reappear.

Redesignate succeeding sections accordingly.

Page 1, line 10, strike “nearly”.

Page 6, line 14, strike “nearly”.

Page 6, line 21, strike “nearly”.

Page 7, line 24, strike “nearly”.

Page 10, line 23, strike “nearly”.

Page 11, line 3, strike “nearly”.

Page 11, line 20 strike “nearly”.

Page 8, line 3, insert “actual” before “minor engaged”.

Page 8, line 4, after “~~sexually~~ explicit conduct.” insert “This definition does not apply to depictions that are drawings, cartoons, sculptures, or painting depicting minors or adults.”.

Page 7, line 10, insert “a child who has not attained the age of 12 years, or” after “means”.

Page 15, strike line 7 and all that follows through line 6 on page 16.

Page 15, line 6, insert “and” after the semicolon.

Page 16, line 7, strike “(4)” and insert “(3)”.

At the the end the following:

1 **SEC. . SEVERABILITY.**

2 If any provision of this Act, of the application of such
3 provision to any person or circumstance, is held invalid,
4 the remainder of this Act, and the application of such pro-
5 vision to other persons not similarly situated or to other
6 circumstances, shall not be affected by such invalidation.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Chairman, I'm offering—

Mr. WATT. Mr. Chairman, a point of order.

Mr. SMITH.—an amendment to H.R. 46—

Chairman SENSENBRENNER. Does the gentleman wish to reserve a point of order?

Mr. WATT. Well, my point is we don't have the amendment. They seem to be distributing only on one side of the Committee, and we don't—it's hard to deal with an amendment we haven't seen.

Chairman SENSENBRENNER. We'll start the clock again.

The gentleman from Texas.

Mr. SMITH. Mr. Chairman, I am offering an amendment to H.R. 4623 to make a few key changes that will further strengthen the bill.

First, the amendment includes congressional findings. I've added these findings to highlight the compelling Government interest. The Government has a compelling interest in ensuring that the criminal prohibitions against child pornography remain enforceable and effective.

Second, the amendment would narrow the definition of child pornography even further than the bill did as introduced. Initially section 2 of the bill narrowed the definition of child pornography in several ways. Section 2(a) of the bill narrows the definition of child pornography under section 2256 to depictions that are, “computer images,” that is, pictures scanned into a computer, or “computer generated images.”

The Court was concerned in *Free Speech Coalition* that the breadth of the language would prohibit legitimate movies like “Traffic” or plays like “Romeo and Juliet.” Limiting the definition

to computer images or computer generated images will help to exclude ordinary motion pictures from the coverage of virtual child pornography.

Next the bill would narrow the definition by replacing the phrase "appears to be" with the phrase "is indistinguishable from." That new phrase addresses the Court's concern that cartoon sketches and statues of children would be banned under the statute. At Subcommittee we added a definition to the term "indistinguishable" to mean virtually indistinguishable in that the depiction is of a minor engaged in sexually explicit conduct.

To clear up any ambiguity the amendment further limits the definition of "indistinguishable" by clarifying that this definition does not apply to depictions that are drawings, cartoons, sculptures or paintings depicting minors or adults.

This amendment also amends section 8 of the bill to remove a confusing new reporting provision. At the request of the National Center for Missing and Exploited Children, the amendment includes a provision to fix a deficiency in the current law that will not allow the federally-funded Internet Crimes Against Children Task Forces to receive reports from the Cyber Tip Line. These task forces are State and local police agencies that have been identified by the National Center as competent to investigate and prosecute computer facilitated crimes against children.

Only the designated Federal agencies, FBI and Customs, are authorized to receive direct access to these reports. Since 9-11 the resources of the FBI have been stretched in a way which does not optimize the overall ability of law enforcement to effectively deal with the volume of cases being sent to the National Center for Missing and Exploited Children. The proposed language would authorize Internet Crimes Against Children Task Forces access to Cyber Tip Line reports. The vast majority of cases in this area are being investigated and prosecuted by State and local law enforcement. Accordingly, this amendment would allow the task forces to receive the information as well. The Department of Justice and the National Center have agreed to the language.

Finally, in response to a new website that displays pictures of children being raped and sodomized by adults, where the pictures are clearly virtual but obscene, this amendment includes a provision that would enhance the penalties for such obscenity. This website was clearly created in response to the Supreme Court decision, and proudly states that it is there for whetting the appetites of pedophiles everywhere.

The Supreme Court's 1982 decision in *New York v. Ferber*, which declared child pornography was not constitutionally protected speech, helped drive the child pornography market underground. It is apparent that the Supreme Court's recent decision may have done the opposite and brought that market out. Accordingly, I believe that these changes to the bill are needed to strengthen it, and Mr. Chairman, I will yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Mr. Chairman, first I'd like to say that some of the findings, like Finding No. 11, and some of the others, this is the first time I've seen this and may need to ask some questions. And I guess the first question to the gentleman from Texas would be

whether or not the provision in the original bill requires a finding of obscenity before conviction can take place in any part of the bill if this amendment is adopted.

Mr. SMITH. If the gentleman will yield, it's my understanding that it would not require that for child pornography.

Mr. SCOTT. Reclaiming my time to ask another question, on page 1 of the Committee amendment in the nature of a substitute, section 2, on line 9, would it still be illegal, under the bill if the amendment is adopted, for computer-generated images indistinguishable, is that language still in the bill? On page 1 of the Committee amendment in the nature of a substitute, line 9, are we still prohibiting non-obscene computer-generated images that do not involve real children?

Mr. SMITH. If the gentleman will yield?

Mr. SCOTT. I'll yield.

Mr. SMITH. That language, computer image or computer-generated image that is nearly indistinguishable is still in the——

Mr. SCOTT. Now, you struck "nearly."

Mr. SMITH. Excuse me?

Mr. SCOTT. You struck "nearly" in your amendment.

Mr. SMITH. That's correct. That would be the one change.

Mr. SCOTT. But the computer-generated image is still prohibited even though it is not obscene?

Mr. SMITH. The answer is yes, when it applies to child pornography just simply because child pornography can be prohibited even if not technically under the obscene definition.

Mr. SCOTT. Reclaiming my time, that is exactly what the Supreme Court said you couldn't do under *Ashcroft*, and that is the entire issue of this legislation, whether or not you can declare child pornography that is not obscene under the obscenity measure, whether or not you can prohibit it. And the Supreme Court, five Justices, at least five, with a couple concurring in part, said you cannot do that. The ruling was just a few weeks ago.

Mr. SMITH. If the gentleman will yield, we simply have a different reading of what the Supreme Court said, and I believe that this bill, as drafted, because it is much more narrow than the law that was found to be unconstitutional will be found constitutional by a majority of the Supreme Court members.

Mr. SCOTT. Reclaiming my time. Then, Mr. Chairman, I think the only thing indistinguishable going on is that this statute is indistinguishable from the one the Supreme Court threw out just a few weeks ago, and I yield back my time.

Ms. LOFGREN. Would the gentleman yield for a question?

Mr. SCOTT. Excuse me. I'll yield.

Ms. LOFGREN. For the Chairman of the Committee. I don't know whether it's the intention of the Chairman to recess for lunch, but this is a long and reasonably complicated amendment that I think is offered in good faith to try and reach the issues raised by the Supreme Court. I have a number of questions about the 1466B on page 8.

I am eager to meet the issues raised by the Court so that we can have a strong response, but I'm not sure we're going to be able to really——

Chairman SENSENBRENNER. The gentlewoman from California makes a good suggestion, and the Chair is prepared to recess now until 1:15 so that Members and staff can look at this amendment.

Before doing so, however, let the Chair state that we have a number of other bills on the calendar, and the Chair intends to go to about 3:30 p.m. If we get done with the other bills on the calendar, excluding Mr. Frank's immigration bill, because we've still got a little more work to do on that, then we won't have to come back tomorrow. But if we don't get through the other bills, the remaining part of the calendar, then we will have to come back tomorrow. It's my hope that we will be able to get things done by then.

The gentleman from Massachusetts.

Mr. FRANK. Mr. Chairman, I would ask if I could strike the last word, and I agree. I don't want to hold up a recess, but I have a Subcommittee markup in the Housing Subcommittee, where I'm Ranking Member and I may not be able to get back. And I did just want to express my concern over the implications of it, hoping it gets discussed further.

In the amendment, Section 2 Findings, lines 8 through 10, "Even otherwise protected speech may be regulated pursuant to a statute that is narrowly drawn to promote a compelling Government interest." One that doesn't seem to me to be necessary to the bill since the bill asserts that child pornography is not entitled to protection.

But I am troubled by that and by the implications of it. Perhaps I shouldn't be because it does seem to me it would be a strong argument to be used in defense of the Shays-Meehan Bill, which is protected speech that was being regulated. But I am troubled about that. I don't know why it's necessary, and I would hope we could have some discussion on this. I mean protected speech, I assume this means more than time, place and manner regulation, which is—wouldn't rise to that. So I'd yield to the gentleman from Texas, but I would hope that would get some focus.

Mr. SMITH. Thank you, Mr. Frank, for yielding. I just want to make a couple points. One, that particular statement is from the Supreme Court decision as you say, *United States v. Playboy*, but I think you do make a valid point that may not be relevant to the subject at hand, and for that reason, I'd be willing to take that sentence out.

Mr. FRANK. I thank the gentleman.

Chairman SENSENBRENNER. The Committee stands recessed until 1:15 p.m. Members should be prompt so we don't have to come back tomorrow.

[Whereupon, at 11:58 a.m., the Committee recessed, to reconvene at 1:15 p.m., the same day.]

AFTERNOON SESSION

Chairman SENSENBRENNER. The Committee will be in order. When the Committee recessed for lunch, the gentleman from Texas, Mr. Smith, had made a motion to report favorably H.R. 4623. Pending at that time was an amendment in the nature of a substitute approved by the Subcommittee and an amendment to the Subcommittee amendment in the nature of a substitute offered by Mr. Smith of Texas.

For what purpose does the gentleman from Texas seek recognition for unanimous consent?

Mr. SMITH. Mr. Chairman, I have an unanimous consent request at the desk.

Chairman SENSENBRENNER. The clerk will report the U.C.

Is it not at the desk?

The CLERK. No, sir.

Mr. SMITH. Mr. Chairman, I will be happy to read it, if that will facilitate the consideration.

Chairman SENSENBRENNER. The clerk now has it.

Mr. SMITH. Okay.

The CLERK. Unanimous consent offered by Subcommittee Chairman Smith. Mr. Chairman, I ask unanimous consent that the pending amendment be modified as follows: On page 1, line 8, strike the sentence beginning with the word "even," and the accompanying citation. And on page 5, strike line 19 through 23, and put a period after the word "images" on line 18.

Chairman SENSENBRENNER. Without objection, the amendment is modified to reflect the unanimous consent just reported by the clerk.

Further debate?

If not, the question is on the amendment to the Subcommittee amendment in the nature of a substitute as modified.

Mr. SMITH. Parliamentary inquiry, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman will state his inquiry.

Mr. SMITH. You're voting on?

Chairman SENSENBRENNER. The question is on the amendment to the subcommittee amendment in the nature of a substitute as modified, offered by the gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you.

Chairman SENSENBRENNER. For what purpose does the gentleman from California seek recognition?

Ms. LOFGREN. To strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. LOFGREN. I will not use the 5 minutes. I would just like to commend the gentleman from Texas for this effort. And I believe that these provisions are very carefully crafted and are constitutional. And I'm proud to support the effort.

And I yield back the balance of my time.

Chairman SENSENBRENNER. For what purpose does the other gentleman from California, Mr. Schiff, seek recognition?

Mr. SCHIFF. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCHIFF. I also want to join in support of the amendment to the amendment, as well as the substitute amendment.

I started out somewhat skeptical of our ability to craft legislation around the Supreme Court decision in *Ashcroft*. But after further study of the *Ashcroft* decision and consultation with the Subcommittee Chair and the Department of Justice, I think there are a couple of reasons why this legislation narrowly crafted is likely to survive constitutional muster, although it will be a very close question.

The first is that the Court in *Ashcroft* said that the Government could not rely on the *Ferber* decision to support its case but left

open a small window of opportunity, that on a basis other than *Ferber*, a law precluding certain not obscene but nonetheless child pornography might be upheld. And I think the compelling interest in our trying to fit within that narrow window is the technological fact that we are now at a point where we really cannot distinguish between virtual and real child pornography, or we're very close to that point.

And given that problem, if we only go after pornography that is produced using real children, and we do not go after that which is virtually indistinguishable from such, we will effectively preclude any prosecution of child pornography.

So I think there's a compelling reason to try to avail ourselves of the window that the Supreme Court left open. And the precise window they left open was the use of an affirmative defense.

And I think by targeting this prohibition to child pornography that is virtually indistinguishable from real, that is computer-generated, we have defined it as narrowly as possible while at the same time leaving the Government its ability to prosecute these cases.

I want to compliment the gentleman for his craftsmanship and urge my colleagues to support—

Mr. SMITH. Would the gentleman yield briefly?

Mr. SCHIFF. I'd be happy to yield.

Mr. SMITH. Mr. Chairman, I just want to thank the gentleman from California, as well as the gentlewoman from California, both for their comments and for their support. And Mr. Schiff has, along in the process, made several suggestions which we have adopted and which I appreciate as well.

I'll yield back.

Chairman SENSENBRENNER. The question is on the Smith amendment to the Subcommittee amendment in the nature of a substitute as modified.

Those in favor will say aye.

Opposed, no.

The ayes appear to have it. The ayes have it.

Are there further amendments?

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 4623, offered by Mr. Scott.

Page 1, line 6, strike all of subsection (a) and redesignate succeeding subsections accordingly.

[The amendment follows:]

**AMENDMENT TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO
H.R. 4623
OFFERED BY MR. SCOTT**

Page 1, line 6 strike all of Subsection "(a)", and redesignate
succeeding subsections accordingly..

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, this amendment would actually conform the bill to the Supreme Court's actual decision in *Ashcroft v. Free Speech Coalition*, as opposed to trying to conform it to an opinion which has been opposed by at least five judges in that case.

Proponents of the bill believe the Court left open the question of whether the Government can criminalize computer-generated images that are not obscene and do not involve real children. Obscene images can always be prosecuted, but the Court clearly said that the Government cannot criminalize images which are not obscene unless the product involved actual children.

In striking down the offending portions of the CPPA and upholding its decision in *Ferber* from 1982, the Court stated: In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not intrinsically related to the sexual abuse of children as were the materials in *Ferber*.

Ferber then not only referred to the distinction between actual and virtual child pornography, it relied on it as a reason supporting its holding. *Ferber* provides no support for a statute that eliminates a distinction and makes the alternative mode criminal as well.

It further cited *Osborne*, a 1990 case, which said the distribution of descriptions or other depictions of sexual conduct not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performance, retains First Amendment protection.

Now, the proponents also argue that the Court did not consider the harm done to children that will occur through technological advances when you can't tell real children from virtual children.

And it addressed the Government's ability to prosecute. It said that the idea that the Government can't prosecute as a problem, it says the hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional computerized images would suffice.

They went on to say that the argument that protected speech may be banned as a means to ban unprotected speech, that this analysis turns the First Amendment upside down. The Government may not suppress lawful speech as a means of suppressing unlawful speech.

It also said that the Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech was not unlawful. An affirmative defense applies only after the prosecution has begun, and the speaker must himself prove, on pain of felony conviction, that his conduct falls within the affirmative defense.

In cases under CPPA, the evidential burden is not trivial. Where the defendant is not the producer of the work, he may have no way of establishing the identity or even the existence of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for an innocent possessor.

The proposed statute, however, makes by its very words illegal what the Court just said was legal. If it were an evidentiary rule that said that proving the real child case would be made with the

introduction of indistinguishable images, subject, I guess, to an affirmative defense, that might be different. But here the proposed criminal statute itself makes illegal exactly what the Court said was protected speech.

Five Justices joined in the majority opinion. One concurred, one concurred in part and dissented in part, and two dissented. With five Justices agreeing with the whole decision and two agreeing in part, this isn't a close, split decision.

So, Mr. Chairman, I think my amendment would bring this bill in compliance with the clear provisions of *Ashcroft v. Free Speech Coalition* and avoid the necessity of the Court telling us again that we cannot prosecute child pornography unless real children were in fact involved in the production of the material, unless the material was legally obscene.

I hope we would adopt the amendment to conform the bill to the Constitution. And I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Texas.

Mr. SMITH. Mr. Chairman, I oppose the amendment.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SMITH. And I noticed that Mr. Schiff was seeking to be recognized, so I'll be happy to yield part of my time to him.

Mr. SCHIFF. I thank the gentleman for yielding.

One observation I wanted to make, because the concern the gentleman from Virginia has raised was one that I shared as well, but I think the Court in *Ashcroft* explicitly states that we need not decide, however, whether the Government could impose this burden on a speaker. Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient even on its own terms.

So the Court said that we don't decide here whether you can establish affirmative defense, because affirmative defense in the pre-existing law was inadequate. This is a different affirmative defense established in this bill. I think this affirmative defense is precisely the one the Court says it left open.

Now, if the Court is saying that we haven't decided today whether you could prohibit virtual as well as real, if you provided an affirmative defense that allowed the defendant to prove that in fact it was all virtual, if the Court has said we're leaving that open, the Court has invited the Congress to, if it finds in its judgment appropriate, establish that affirmative defense.

And the only way that an affirmative defense makes sense is if what you're attacking is child pornography that is indistinguishable, real from virtual, because if this statute were now rewritten to prohibit only real child pornography, what would the point be of an affirmative defense? There would be no need to show that it was produced using a computer, because that would not even be precluded. That would not be an affirmative defense; that would be a real defense by any means.

So the Court must have contemplated that the new statute, if there was one to be passed by Congress establishing an affirmative defense, would have to prohibit conduct that was slightly broader than only real.

And what we have crafted here I think is something that is as narrow as possible; that is pornography indistinguishable from

real, that basically we can't really tell whether it's real or it's virtual.

So I think that by the Court inviting an affirmative defense, they are in fact saying that it's an open question, whether the Congress could prohibit something slightly more than only real.

And I think that a real good faith effort has been made to craft this law in the narrowest way possible to test that theory of an affirmative defense, which I think the Court will likely support.

I yield back to the gentleman.

Mr. SMITH. I thank the gentleman for his comments.

Mr. Chairman, Congress does have a compelling State interest to protect children from exploitation, and that interest extends to the prosecution of those who would or do exploit children. The problem is that a computer image seized from a child pornographer is rarely a first generation product and the retransmission of images can alter the image and make it impossible even for an expert to testify whether or not a particular image depicts a real child.

Realizing that this technology threatened the Government's compelling State interests in protecting real children to the effective prosecution of the child pornography laws that cover the visual depictions of real children, Congress in 1996 attempted to address this concern. The 1996 statutory language included any virtual depictions and included pictures of youthful-looking adults and didn't just limit it to children. That, understandably, the Supreme Court found to be overbroad.

This bill narrows the definition to a subcategory of visual depictions that trigger a compelling State interest. Evidence submitted to the Congress demonstrates that technology is available today that allows child pornographers to create depictions of virtual children that an ordinary person viewing the depictions could not distinguish from real children. It also allows child pornographers to disguise depiction of real children to look like computer-generated pictures and allows child pornographers to disguise depictions of real children to make those children unidentifiable.

The Court does not prohibit the Congress from prohibiting virtual child pornography when the prohibition is narrowly drawn to promote a compelling Government interest. And that's what we do in this particular bill.

I'll only add one thing to what the gentleman from California has said so well, and that is in regard to the affirmative defense, and I'll quote Justice Thomas in his concurring opinion: "The Court does leave open the possibility that a more complete affirmative defense could save a statute's constitutionality, implicitly accepting that some regulation of virtual child pornography might be constitutional." And no member of the Court took exception to that statement.

Mr. Chairman, we have narrowed the definition in significant ways and have pointedly addressed the Court's concerns about affirmative defense. The Court gave us an opportunity, and I believe we have an obligation to take it to protect our children.

And I'll yield back the balance of my time.

Chairman SENSENBRENNER. The question is on—

Mr. SCOTT. Mr. Chairman, the gentleman has some time. I'd like to read—

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. SCOTT. I'd ask unanimous consent that he be given 2 additional minutes.

Chairman SENSENBRENNER. Without objection.

Mr. SCOTT. And if the gentleman would yield, so I could read—

Mr. SMITH. I'll be happy to yield to the gentleman from Virginia.

Mr. SCOTT. The paragraph that begins: "We do not decide, however, whether the Government could impose this burden on a speaker, even if the affirmative defense can save the statute from the First Amendment challenge, here the defense is incomplete."

But they conclude that paragraph by saying: "For this reason, the affirmative defense cannot save the statute, for it leaves unprotected a substantial amount of speech not tied to the Government's interest in distinguishing images produced using real children from virtual ones."

The concurring opinion on Thomas is one vote. Five people signed the majority opinion, which disagreed with Thomas' opinion.

Mr. SCHIFF. Would the gentleman yield?

Mr. SMITH. You can't find anything in the Ashcroft opinion, in the main opinion, with five judges signing it, that agrees with Thomas' concurring opinion.

Mr. SCHIFF. Would the gentleman yield?

Chairman SENSENBRENNER. The time belongs to the gentleman from Texas.

Mr. SMITH. Let me respond briefly, and then I'll be happy to yield to the gentleman from California.

I'll mention a couple of things. First of all, you mentioned only Justice Thomas referred or mentioned affirmative defense. However, in the quote I just mentioned, I also pointed out that no other member took exception to what he said.

But I will say, we expect to pick up one or more other Supreme Court Justices, if the gentleman wants to know the strategy—particularly, for instance, Sandra Day O'Connor, perhaps Kennedy—by focusing specifically on minors and not having the constitutionally—the unconstitutionally overbroad language of perhaps including adults.

So by narrowing the scope both in regard to the age of individuals involved and narrowing the scope of virtually indistinguishable between one image and another, and also by having a better affirmative defense, we expect to pick up a number of votes of Supreme Court Justices.

Chairman SENSENBRENNER. The gentleman's time has once again expired.

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt.

Mr. WATT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. I yield to Mr. Scott.

Mr. SCOTT. Thank you. And I appreciate the gentleman yielding so I can read again what I read the Supreme Court said: "The distribution of descriptions or other depictions of sexual conduct not otherwise obscene, which do not involve live performances or photo-

graphic or other visual productions of live performances, retains First Amendment protection."

Five judges signed that. The Five judges also signed the opinion that said: The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving a speech was not lawful, and affirmative defense applies only after prosecution has begun. And the speaker must himself prove, on the pain of felony conviction, that his conduct falls within the affirmative defense. In cases under the CPPA, the evidentiary burden is not trivial. Where the defendant is not the producer of the work, he may have no way of establishing the identity or even the existence of the actors. The evidentiary issue—if the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor.

They've already dealt with the problem of prosecution. They said that's too bad. You may agree or disagree with that decision, but they said it's too bad.

Mr. SCHIFF. Will the gentleman yield?

Mr. WATT. I'll yield to the gentleman from California.

Mr. SCHIFF. I thank the gentleman for yielding.

The Court's majority opinion, though, also provides the language that we've been referring to with respect to an affirmative defense. The particular portion that the gentleman read takes issue with the affirmative defense that existed in the law that was struck down.

But what the Court majority opinion also said is that: We leave open the question whether a better-framed affirmative defense would succeed in saving the statute.

The flaw that was identified in the preexisting statute and its affirmative defense was that the affirmative defense "provides no protection to persons who produce speech by using computer imaging or through other means that do not involve the use of adult actors who appear to be minors."

That flaw, that inadequate affirmative defense, has been cured by this bill, which does provide an affirmative defense, if the speech was produced using computers or using adult actors who appear to be minors.

So the flaw that the Court identified in the preexisting affirmative defense has been cured. And the question of whether a better affirmative defense, such as we have here, will survive constitutional scrutiny was explicitly left open by the majority of the Court.

So I think that the most that can be said, and the least that can be said, is that the Court has specifically left open the issue of whether this would be constitutional. And I think the compelling reason why we ought to test this question is, in the absence of this action, I simply think it will be impossible for the Government to prosecute child pornography because it will always be a defense that the material could have been computer-produced. It simply will be an unmeetable burden for the Government to show that whatever the photograph or image is could not have been produced using a computer.

Mr. NADLER. Would the gentleman yield for a question?

Mr. SCHIFF. I'd be happy to yield back to the gentleman.

Mr. WATT. I'll yield to Mr. Nadler.

Mr. NADLER. Thank you.

Isn't it a question of fact, whether in fact the alleged child pornography is in fact child pornography or is virtual, and the Government has to prove the case?

Mr. SCHIFF. Will the gentleman yield?

Mr. NADLER. And let me just say that if the Government can't prove it under the Supreme Court decision, it's constitutionally protected.

Mr. SCHIFF. If the gentleman will yield?

Mr. WATT. I'll yield to the gentleman.

Mr. SCHIFF. It is true under the current law, and in light of the *Ashcroft* decision, that you cannot prosecute child pornography unless you prove it's real. The problem is, as we're finding from prosecution offices around the country, that they cannot generally meet that burden because computer technology has gotten so good.

So if we are going to allow the prosecution to prosecute child pornography, the only way to do it is to prohibit pornography that is virtually indistinguishable from real—

Mr. NADLER. Would the gentleman yield again for a question?

Mr. SCHIFF.—and allow an affirmative defense where the defendant can show that in fact it was not real.

Mr. WATT. Let me just reclaim my time quick enough to say—because it's about to run out—that it seems to me that what you're doing, though, is shifting the burden of proof to the defendant. And I just—I mean, with the presumption of innocence, this affirmative defense thing really has the effect of shifting the burden of proof. And I don't see how you get around that in this bill. Maybe I'm wrong.

I'll yield back.

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. The question is on—the gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you.

I don't—I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized.

Mr. NADLER. Let me make a comment first, and then I think Mr. Watt wanted some time.

Mr. WATT. Mr. Scott.

Mr. NADLER. No, I meant Mr. Watt. I thought you wanted time. Mr. Scott.

Mr. Chairman, if in fact the Supreme Court has said, as it has, that only the actual picture, not the virtual image, may be prosecuted as child pornography constitutionally, and the evil, obviously—the particular evil of child pornography is the fact that you use children to produce it, that children are being exploited—whereas, in creating a virtual image, there are no children being used or exploited.

Standard criminology, you know, Criminal Law 101 says that the prosecution must prove every element of the crime. And one of the elements of the crime is that, in fact, a child was used. That's what the Supreme Court said.

So I don't see how you can shift the burden of proof to the defense to prove that he didn't do something which the prosecution hasn't proved he did. So I can't see how this bill or shifting the burden to an affirmative defense can get around the Supreme Court decision, which is very clear.

And I think this bill is the newest in a series of attempts to do what the Supreme Court keeps telling us we can't do and will be just as futile as the previous attempts.

Mr. SMITH. Would the gentleman yield very briefly?

Mr. NADLER. I think Mr. Scott wanted me to yield first.

Mr. SCOTT. Yes. This is actually worse than shifting the burden of proof. The Supreme Court said you can't prohibit child pornography that does not use real children, unless it's obscene. This puts in the criminal statute exactly that, that it could be virtual child pornography and that's illegal.

Now, the affirmative defense comes in and proves, if that's the case, if that's the evidence that's presented, that virtual child pornography—the exact same thing the Supreme Court said you can't prohibit—if that's what you put on as your prime facie case, you've got a conviction. You've got a conviction under language the Supreme Court said you can't do.

Now, if the statute said real, live children, and you can introduce evidence that's virtually indistinguishable and then try to shift the burden on that, that's one thing. But you have in the prime facie case, in the criminal statute, language which clearly the Court said, every different kind of way it can, you can't prohibit.

And that's different from the burden of proof. The Supreme Court said it's not illegal. And if that's your prime facie case, why do you need any defense?

Mr. SCHIFF. Will the gentleman yield?

Mr. NADLER. I'll yield.

Mr. SCHIFF. I think the gentleman from New York is correct in that, when you use an affirmative defense, you are in effect shifting the burden of proof on an element of what is being charged. The fact is there are many affirmative defenses throughout the criminal law. They generally exist in areas where the defense rather than the prosecution is in unique position to know the truth of the merits as to that element. Sometimes it has to do with a defendant's mental state or their diminished capacity to commit a crime.

In this case, the knowledge of whether something was produced using a real child or using a computer is more often going to be uniquely in the possession of the person creating the image.

Now, I recognize the discomfort in shifting—

Mr. NADLER. Reclaiming my time, the problem with what you're saying is that affirmative defenses cannot be used to relieve the prosecution of the burden of proving an essential—a constitutionally essential element of the crime, which in this case has been specifically stated by the Supreme Court to be constitutionally essential.

Mr. SCOTT. Will the gentleman yield?

Mr. NADLER. Yes, I will.

Mr. SCOTT. And another problem is, the Supreme Court dealt with that when it said: "If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor."

They dealt with that problem, and they knocked it out of the park. You can't use that argument.

Mr. SMITH. Will the gentleman—

Mr. SCHIFF. Will the gentleman—

Mr. SCOTT. Five judges signed that opinion.

Mr. SCHIFF. If the gentleman will yield one more moment?

Mr. NADLER. Yes.

Mr. SCHIFF. The fact is, the majority of the Supreme Court said they were leaving open the question of whether an affirmative defense would save the statute.

So far from deciding in the case that you could not have a shifting of the burden on this point, the Supreme Court explicitly said: We are not deciding this question.

Mr. SMITH. Would the gentleman—

Mr. NADLER. Reclaiming my time, and then I'll yield to Mr. Smith, I'll simply say they left it open because they didn't have to reach it for decision, because they said that the prosecution has to prove it was a real child.

I'll yield to Mr. Smith.

Mr. SMITH. Very briefly, I just want to make the point that—

Chairman SENSENBRENNER. The gentleman's time has expired.

The question is on the Scott amendment to the Committee amendment in the nature of a substitute.

Those in favor will say aye.

Opposed, no.

The noes appear to have it. The noes have it, and the amendment to the Subcommittee amendment in the nature of a substitute is not agreed to.

Are there further amendments?

Ms. HART. Mr. Chairman?

Chairman SENSENBRENNER. The gentlewoman from Pennsylvania, Ms. Hart.

Ms. HART. Thank you, Mr. Chairman. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to the Subcommittee amendment in the nature of a substitute to H.R. 4623 offered by Ms. Hart.

Add at the end the following: Section, investigative authority relating to child pornography.

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[The amendment follows:]

**AMENDMENT TO THE SUBCOMMITTEE AMEND-
MENT IN THE NATURE OF A SUBSTITUTE TO
H.R. 4623**

OFFERED BY MS. HART

Add at the end the following:

1 **SEC. . INVESTIGATIVE AUTHORITY RELATING TO CHILD**
2 **PORNOGRAPHY.**
3 Section 3486(a)(1)(C)(i) of title 18, United States
4 Code, is amended by striking “the name, address” and
5 all that follows through “subscriber or customer” and in-
6 serting “the information specified in section 2703(c)(2)”.

Chairman SENSENBRENNER. And the gentlewoman is recognized for 5 minutes.

Ms. HART. Thank you, Mr. Chairman.

This amendment makes technical changes to update the current law regarding the use of administrative subpoenas in the child pornography investigations.

Under section 3486, the use of administrative subpoenas in child pornography investigations is permitted pursuant to section 2703 of the Electronic Communications Privacy Act.

We recently updated the type of information that may be acquired through an administrative subpoena in section 2703 but failed to update the same language in section 3486.

The best way to change this oversight, in my opinion, is by referencing the language of section 2703 in section 3486, which is what my amendment will do.

The practical implications of this change are important to vigorous investigations of online crimes against children. Currently, section 3486 only allows the collection of information such as the name, address, and length of service of the service provider.

With child pornographers able to hide behind false identities, my amendments will allow investigators to collect the important billing information that can show the true identity of these individuals and further the investigation in a more timely manner.

The protection of children from harmful material and online predators in an important issue. And I thank the Chairman and the Committee for acting so quickly on this issue, and so thoughtfully, to address the concerns raised by the recent Supreme Court decision. But because protecting our children from dangerous indi-

viduals is also very important, I believe it's necessary we provide law enforcement with tools to track these criminals who travel in cyberspace to prey on children.

One of the major issues raised in the *Ashcroft v. Free Speech Coalition* decision, and in the commentary after the decision, was law enforcement's concerns about tracking online predators. My amendment simply updates criminal law and provides law enforcement with reasonable authority to identify online offenders. In short, this amendment makes a necessary clarification to recent updates to the criminal code, which will ultimately assist in the investigation and apprehension of child pornographers.

I ask the Committee to adopt the amendment and further want to alert the Committee, Mr. Chairman, that recently in Pittsburgh there was a case where, fortunately, the predator had registered for his Internet service under his own name and his own address and so was easily tracked. If that same predator had not done so, the girl that he held for only 3 days, tied to a bed in his apartment, would have been there for much longer, and we just don't know what could have happened to her. Fortunately, she was rescued safely by law enforcement, because she was easily tracked.

I yield back.

Mr. NADLER. Will the gentlelady yield for a question?

Chairman SENSENBRENNER. Does the gentlelady from Pennsylvania yield to the gentleman from New York?

Ms. HART. Sure. Yes, thanks, Mr. Chairman.

Mr. NADLER. Yes, Mr. Chairman, I apologize for not having had an opportunity to peruse all these sections of Title 18. I have to ask this question.

You're giving this extra information—the Government demands this information from whom? From the ISP?

Ms. HART. That's correct. This is similar to what we recently did, where we allow the administrative subpoena to have law enforcement get more information from the ISP regarding who is actually getting the service.

Mr. NADLER. That 2703(c)(2) that your referencing deals with what situation?

Ms. HART. It is a situation where an administrative subpoena can be used to receive information through the ISP.

Mr. NADLER. And 3486—what I'm confused about—

Ms. HART. We're adding to this section—

Mr. NADLER. The same language.

Ms. HART.—a similar section that we had added to a different section.

Mr. NADLER. No, I understand that. What I want to know is, what do these two different sections deal with? And, therefore, what's the impact of importing language from the one to the other? In other words, if they dealt with the same thing, then you wouldn't need to do this.

Ms. HART. 2703 lists specifically the information that can be acquired through an administrative subpoena, and 3486 allows its use.

Mr. NADLER. Allows the use of the same—

Ms. HART. Of the administrative subpoena.

Mr. NADLER. Of the information gathered under section 2703?

Ms. HART. That's correct.

Mr. NADLER. So they're dealing with the same situation, just different stages in the same investigation?

Ms. HART. Yes. Different stages, right. Or instructions on what can be acquired.

Mr. NADLER. Okay, thank you.

Chairman SENSENBRENNER. Does the gentlewoman yield back now?

The question is on the Hart amendment to the Subcommittee amendment in the nature of a substitute.

Those in favor will say aye.

Opposed, no.

The ayes appear to have it. The ayes have it, and the amendment to the Subcommittee amendment in the nature of a substitute is agreed to.

Are there further amendments?

Ms. JACKSON LEE. I have an amendment at the desk.

Chairman SENSENBRENNER. The gentlewoman from Texas, Ms. Jackson Lee.

Does the gentlewoman from Texas have an amendment?

Ms. JACKSON LEE. Yes, I'm sorry. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to the Subcommittee amendment in the nature of a substitute to H.R. 4623, offered by Ms. Jackson Lee of Texas.

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[The amendment follows:]

**AMENDMENT TO SUBCOMMITTEE AMENDMENT IN
THE NATURE OF A SUBSTITUTE TO H.R. 4623
OFFERED BY MS. JACKSON-LEE OF TEXAS**

Page 3, after line 10, insert the following:

1 (d) Section 2256(8)(B) of title 18, United States
2 Code, is amended by inserting “, and the depiction taken
3 as a whole appeals to the prurient interest, is patently of-
4 fensive in light of community standards, and lacks serious
5 literary, artistic, political, or scientific value” after “con-
6 duct”.

Chairman SENSENBRENNER. And the gentlewoman from Texas is recognized for 5 minutes.

Ms. JACKSON LEE. I thank you very much.

I think the Chairman of the Crime Subcommittee and the Ranking Member have some commonality in their approach. And that is that this bill is being rewritten because we realize that the original legislation was ruled unconstitutional, and we're trying to ensure that we protect our children—that's my concern, protecting our children—but ensuring that we recognize that we have three branches of Government, the executive, the judiciary—the judicial and the executive.

And for that reason, I'd ask my colleagues to review the amendment that I have that speaks to the controversy of the legislation but does not take away from the legislation's intent, and that is to protect our children.

Having just come back from the U.N. special session on children, realizing that there's not been an international focus on children in 12 years, I would hope that we could find compromise in this legislation. It is aimed at getting rid of pornography—unsightly, horrific, abusive, violent pornography that goes against our children.

Therefore, I offer an amendment that would eliminate the context issue of the pending legislation, something that the Supreme Court referred to. By adding this, I propose to give the judiciary a more definitive standard to evaluate a pornography case. One of the issues raised in *Ashcroft* is that Child Pornography and Prevention Act of 1996 did not prevent prosecution of the makers of the movie "Traffic."

For instance, the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology, a picture that appears to be of a minor engaging in sexually explicit conduct. The statute also prohibits Hollywood movies filmed without any child actors if a jury believes that an actor appears to be a minor engaging in actual or simulated sexual intercourse.

My amendment would apply the *Miller v. California* test to the content of the material. In this test, the Government must prove that the work taken as a whole appeals to the prurient interests; is patently offensive in light of community standards; and lacks serious literary, artistic, political or scientific value.

I think this helps to narrow this particular legislation to ensure that our focus is on children and not on the artistic beliefs and the artistic tastes of adults that may include artistic, political or scientific value.

I would hope that what we are trying to do today is to get after the bad guys who are attacking our children and not begin to argue about the content.

I would offer to say to my colleagues, when a well-known mayor of New York attempted to stop a display of art, whether it be questionable or not, in one of its major museums, we will find that the courts ruled against him.

And so I would hope that we would not send this legislation out of this Committee to the floor of the House and back out to be again ruled unconstitutional. The key element of what we're trying to do is to eliminate pornography as it relates to the attack on our children. And I believe that we're also recognizing that the First Amendment does exist and that we must adhere to some of the

standards that have been accepted by our court system, in this instance, the *Miller v. California* case.

Having had it struck out in the case of the Supreme Court, I'd like to make note of this. In sum, it says: 2256(8)(b) covers material beyond the categories recognized in *Ferber* and *Miller*. And the reasons the Government offers in support of limiting the freedom of speech have no jurisdiction in our precedents or in the law of the First Amendment.

And so I would ask that my colleagues look at this so that we can truly get a bill that is going to respond to the key element. Again, I believe it is the issue of pornography and children. The Court has already made its position known. And I ask my colleagues to support this amendment.

At this time, I yield back.

Chairman SENSENBRENNER. The gentleman Texas, Mr. Smith.

Mr. SMITH. Mr. Chairman, I oppose the amendment.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SMITH. Mr. Chairman, I know the gentlewoman from Texas has a special interest in this legislation, since she's an original cosponsor, which I appreciate. But I still have to oppose this amendment simply because the Supreme Court has determined that child pornography does not have to be obscene. And this amendment, unfortunately, would ignore that decision.

This amendment incorporates the three-pronged test for obscenity established by the Supreme Court in *Miller v. California* and thus would limit the prohibition on virtual child pornography only to obscene materials. This defeats the whole purpose of the bill, which is to narrow the definition of computer-generated child pornography so that it remains covered by prohibitions of child pornography laws.

Without the bill, the tougher obscenity standard would have to be met. Obscenity and child pornography are two separate exceptions to the First Amendment protection afforded pornography. These exceptions should not be confused. The compelling State interest to protect children is overwhelming, and part of that interest is to prosecute those who exploit children.

Section 2 of the bill was drafted to salvage as much as possible the existing child pornography laws without having to limit them to obscene materials. Prosecutors need the full range of tools to combat this horrific crime. The Supreme Court has not held that prosecutors are limited to relying on the obscenity laws, and we should not handicap prosecutors in that way.

In summary, Mr. Chairman, the amendment would legalize non-obscene child pornography, and I believe strongly that we must not legalize not-obscene child pornography. And for those reasons, I oppose the amendment and urge my colleagues to oppose it as well.

And I'll yield back the balance of my time.

Chairman SENSENBRENNER. The question is on the Jackson Lee amendment to the Subcommittee amendment in the nature of a substitute.

Mr. SCOTT. Mr. Chairman, move to strike the last word.

Chairman SENSENBRENNER.

The gentleman from Virginia is recognized.

Mr. SCOTT. Mr. Chairman, what we are talking about is the very essence of the legislation. The Supreme Court struck out the idea that you could declare child pornography as obscene. They said you could criminalize child pornography if you use live children, but made it clear every different kind of way they could that you could not criminalize child pornography that did not use real children if it was not otherwise obscene.

Now, this language—I'm not sure that it gets in the right section, but I mean this would make it clearly constitutional because the language in the amendment is essentially the language determining—that you have to consider whether or not something is obscene.

But the idea that we're going to pass this legislation doing exactly what the Supreme Court said you couldn't do is an insult to the Judiciary Committee.

I yield to the gentlelady from Texas.

Ms. JACKSON LEE. I thank the gentleman very much.

And I would like to acknowledge Mr. Smith's comment. You are correct. I have a very special interest in this legislation. I want it to withstand constitutional muster. I am an original co-sponsor, because I believe in attacking at the heart of the problem, which is pornographic materials directed toward our children.

At the same time, I would ask my good friend and colleague to, if you would, digest and analyze the comments of the Ranking Member and, as well, the intent of this amendment. Obviously, I will look to any modifications as to its location.

But I think where we're trying to go as we move this bill out of Committee is to make it, if you will, subject to constitutional muster in the right way and that we go after the heart of the problem.

We're always going to come up against the issues of literary content, artistic content, political content, or scientific content, using such depictions for these reasons. And there will always be the ability of someone to raise this and bring this to the attention of the courts on the basis of: "I was using this for scientific reasons and political reasons," "I was using this for artistic reasons," et cetera.

I believe we would do well in the Judiciary Committee to respect the three branches of Government, attempt to pass legislation that will reach constitutional muster. And I would ask my colleagues to support this.

And I would yield back to the distinguished gentleman from Virginia.

Do you need the time?

With that, Mr. Chairman, I'll yield back my time.

Chairman SENSENBRENNER. The gentleman from Virginia?

The question is on the Jackson Lee amendment to the Subcommittee amendment in the nature of a substitute.

Those in favor will say aye.

Opposed, no.

The noes appear to have it. The noes have it, and the amendment to the Subcommittee amendment is not agreed to.

Are there further amendments?

If not, the question is on the Subcommittee amendment in the nature of a substitute as amended.

Those in favor will say aye.

Opposed, no.

The aye appears to have it. [Laughter.]

The aye has it.

Mr. SMITH. Mr. Chairman, I'd like a recorded vote at the final passage.

Chairman SENSENBRENNER. Well, let's see if we have a reporting quorum. A reporting quorum is present. The question now occurs on the motion to report the bill H.R. 4623 favorably.

Those in favor will say aye.

Opposed, no.

The ayes appear to have it. The ayes have it.

The gentleman from Texas?

Mr. SMITH. Mr. Chairman, I'd like a recorded vote, please.

Chairman SENSENBRENNER. A recorded vote is requested.

Those in favor of reporting the bill favorably will, as your names are called, answer aye. Those opposed, no.

And the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Gekas?

Mr. GEKAS. Aye.

The CLERK. Mr. Gekas, aye. Mr. Coble?

Mr. COBLE. Aye.

The CLERK. Mr. Coble, aye. Mr. Smith?

Mr. SMITH. Aye.

The CLERK. Mr. Smith, aye. Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye. Mr. Barr?

[No response.]

The CLERK. Mr. Jenkins?

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins, aye. Mr. Cannon?

Mr. CANNON. Aye.

The CLERK. Mr. Cannon, aye. Mr. Graham?

Mr. GRAHAM. Aye.

The CLERK. Mr. Graham, aye. Mr. Bachus?

[No response.]

The CLERK. Mr. Hostettler?

Mr. HOSTETTLER. Aye.

The CLERK. Mr. Hostettler, aye. Mr. Green?

[No response.]

The CLERK. Mr. Keller?

Mr. KELLER. Aye.

The CLERK. Mr. Keller, aye. Mr. Issa?

[No response.]

The CLERK. Ms. Hart?

Ms. HART. Aye.

The CLERK. Ms. Hart, aye. Mr. Flake?

Mr. FLAKE. Aye.

The CLERK. Mr. Flake, aye. Mr. Pence?

[No response.]

The CLERK. Mr. Forbes?

Mr. FORBES. Aye.

The CLERK. Mr. Forbes, aye. Mr. Conyers?

[No response.]

The CLERK. Mr. Frank?

[No response.]

The CLERK. Mr. Berman?

[No response.]

The CLERK. Mr. Boucher?

[No response.]

The CLERK. Mr. Nadler?

Mr. NADLER. No.

The CLERK. Mr. Nadler, no. Mr. Scott?

Mr. SCOTT. No.

The CLERK. Mr. Scott, no. Mr. Watt?

[No response.]

The CLERK. Ms. Lofgren?

[No response.]

The CLERK. Ms. Jackson Lee?

Ms. JACKSON LEE. Aye.

The CLERK. Ms. Jackson Lee, aye. Ms. Waters?

[No response.]

The CLERK. Mr. Meehan?

Mr. MEEHAN. Aye.

The CLERK. Mr. Meehan, aye. Mr. Delahunt?

[No response.]

The CLERK. Mr. Wexler?

[No response.]

The CLERK. Ms. Baldwin?

[No response.]

The CLERK. Mr. Weiner?

[No response.]

The CLERK. Mr. Schiff?

Mr. SCHIFF. Aye.

The CLERK. Mr. Schiff, aye. Mr. Chairman?

Chairman SENSENBRENNER. Aye.

The CLERK. Mr. Chairman, aye.

Chairman SENSENBRENNER. Are there Members in the chamber who wish to cast or change their vote?

If not, the clerk will report.

The CLERK. Mr. Chairman, there are 16 ayes and two nays.

Chairman SENSENBRENNER. And the motion—a reporting quorum is not present.

Without objection, the vote will be vitiated. And without objection, the previous question on the motion to report favorably is ordered. And we will take it up when a reporting quorum appears.

* * * * *

The Committee met, pursuant to notice, at 10:29 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will be in order. A working quorum is present.

[Intervening business.]

The unfinished business is the motion to report the bill H.R. 4623, upon which the previous question had been ordered. The Chair notes the presence of a reporting quorum.

And for the information of the Members, H.R. 4623 is the "Child Obscenity and Pornography Prevention Act of 2002."

Those in favor of the motion to report the bill favorably will say aye.

Mr. SMITH. Mr. Chairman, I'd like a recorded vote on that as well.

Chairman SENSENBRENNER. Okay.

Opposed, no.

The ayes appear to have it. The ayes have it. A recorded vote is requested.

Those in favor of reporting H.R. 4623 favorably will, as your names called, answer aye. Those opposed, no. And the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Gekas?

Mr. GEKAS. Aye.

The CLERK. Mr. Gekas, aye.

Mr. Coble?

[No response.]

The CLERK. Mr. Smith?

Mr. SMITH. Aye.

The CLERK. Mr. Smith, aye.

Mr. Gallegly?

Mr. GALLEGLY. Aye.

The CLERK. Mr. Gallegly, aye.

Mr. Goodlatte?

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte, aye.

Mr. Chabot?

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye.

Mr. Barr?

[No response.]

The CLERK. Mr. Jenkins?

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins, aye.

Mr. Cannon?

[No response.]

The CLERK. Mr. Graham?

Mr. GRAHAM. Aye.

The CLERK. Mr. Graham, aye.

Mr. Bachus?

[No response.]

The CLERK. Mr. Hostettler?

Mr. HOSTETTLER. Aye.

The CLERK. Mr. Hostettler, aye.

Mr. Green?

Mr. GREEN. Aye.

The CLERK. Mr. Green, aye.

Mr. Keller?

Mr. KELLER. Aye.

The CLERK. Mr. Keller, aye.
 Mr. Issa?
 [No response.]
 The CLERK. Ms. Hart?
 Ms. HART. Aye.
 The CLERK. Ms. Hart, aye.
 Mr. Flake?
 Mr. FLAKE. Aye.
 The CLERK. Mr. Flake, aye.
 Mr. Pence?
 Mr. PENCE. Aye.
 The CLERK. Mr. Pence, aye.
 Mr. Forbes?
 Mr. FORBES. Aye.
 The CLERK. Mr. Forbes, aye.
 Mr. Conyers?
 [No response.]
 The CLERK. Mr. Frank?
 Mr. FRANK. No.
 The CLERK. Mr. Frank, no.
 Mr. Berman?
 [No response.]
 The CLERK. Mr. Boucher?
 [No response.]
 The CLERK. Mr. Nadler?
 [No response.]
 The CLERK. Mr. Scott?
 Mr. SCOTT. No.
 The CLERK. Mr. Scott, no.
 Mr. Watt?
 Mr. WATT. No.
 The CLERK. Mr. Watt, no.
 Ms. Lofgren?
 Ms. LOFGREN. Aye.
 The CLERK. Ms. Lofgren, aye.
 Ms. Jackson Lee?
 [No response.]
 The CLERK. Ms. Waters?
 Ms. WATERS. Aye.
 The CLERK. Ms. Waters, aye.
 Mr. Meehan?
 Mr. MEEHAN. Aye.
 The CLERK. Mr. Meehan, aye.
 Mr. Delahunt?
 [No response.]
 The CLERK. Mr. Wexler?
 [No response.]
 The CLERK. Ms. Baldwin?
 Ms. BALDWIN. Aye.
 The CLERK. Ms. Baldwin, aye.
 Mr. Weiner?
 [No response.]
 The CLERK. Mr. Schiff?
 Mr. SCHIFF. Aye.
 The CLERK. Mr. Schiff, aye.

Mr. Chairman?

Chairman SENSENBRENNER. Aye.

The CLERK. Mr. Chairman, aye.

Chairman SENSENBRENNER. Are there Members in the chamber who wish to cast or change their votes?

The gentleman from California, Mr. Issa.

Mr. ISSA. Aye.

The CLERK. Mr. Issa, aye.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote?

The gentleman from North Carolina, Mr. Coble.

Mr. COBLE.

The CLERK. Mr. Coble, aye.

Chairman SENSENBRENNER. The clerk will report.

The CLERK. Mr. Chairman, there are 22 ayes and three nays.

Chairman SENSENBRENNER. And the motion to report favorably is agreed to.

Without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute, incorporating the amendments heretofore adopted. Without objection, the Chairman is authorized to move to go to conference pursuant to House rules. Without objection, the staff is directed to make any technical and conforming changes. And all Members will be given 2 days, as provided by House rules, in which to submit additional, dissenting, supplemental, or minority views.

DISSENTING VIEWS

H. R. 4623, the “Child Obscenity and Pornography Prevention Act of 2002” is a hasty attempt drafted by the Department of Justice to override the United States Supreme Court’s decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. ____ (2002). While the intentions of the authors may be good, the bill is fatally flawed.

H.R. 4623 seeks to ban “virtual child pornography.” It not only defines child pornography as virtual child pornography that is “indistinguishable” from real child pornography, but makes even possession of an image that is “indistinguishable” a crime.

Child pornography is despicable and illegal, and must be banned and prosecuted. However, pornography that does not involve a child is just that—pornography, which, if not obscene, is not illegal. To constitute “child pornography,” a real child must be involved. Computer generated images depicting child-like characters which do not involve real children do not constitute child pornography any more than a movie with a 22 year old actor who plays, and looks, the role of a 15 year old engaging in explicit sexual activities.

Pornography, computer generated or not, which is produced without using real children, and is not otherwise obscene, is protected under the First Amendment. H.R. 4623, like the Child Pornography Prevention Act (CPPA) struck down in *Ashcroft v. Free Speech Coalition*, attempts to ban this protected material, and therefore is likely to meet the same fate. The fatal flaw in the (CPPA) was its criminalization of speech that was neither “obscene” under *Miller v. California*, nor “child pornography” involving the abuse of real children under *New York v. Ferber*. H. R. 4623 repeats that mistake. Like the CPPA, this bill would not only criminalize speech that is not obscene, but also speech that has redeeming literary, artistic, political or other social value. For example, the bill would punish therapists and academic researchers who used computer-generated images in their research, and film makers who create explicit anti-child abuse documentaries.

H.R. 4623 creates a strict liability offense. Under the bill, prohibited images may not be possessed for any reason, however legitimate. Therefore, any scholarly research that may be used to verify or refute the underlying assumptions of the bill is rendered impossible.

Proponents of the bill believe the court left open the question of whether the government can criminalize computer generated images that are not obscene and do not involve real children. Obscene images can always be prosecuted, but the Court clearly said that the government cannot criminalize images which are not obscene unless the product involved actual children. In striking down the offending portions of CPPA and upholding its decision in *New York v. Ferber*, 458 U.S. (1982), the court stated:

“In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not ‘intrinsically related’ to the sexual abuse of children, as were the materials in *Ferber*, at 759.” (page 12)

“*Ferber*, then, not only referred to the distinction between actual and virtual child pornography, it relied on it as a reason supporting its holding. *Ferber* provides no support for a statute that eliminates the distinction and makes the alternative mode criminal as well.” (Page 13)

Also, in interpreting the case of *Osborne v. Ohio*, 495 U.S.103 (1990), the Court stated:

“*Osborne* also noted the State’s interest in preventing child pornography from being used as an aid in the solicitation of minors. *Id.*, at 111. The Court, however, anchored its holding in the concern for the participants, those whom it called the “victims of child pornography.” *Id.*, at 110. It did not suggest that, absent this concern, other governmental interests would suffice. See *infra*, at 13–15. (page 12)

“The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment. See *id.*, at 764–765 (“[T]he distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection”).” (Page 13)

Proponents also argue that the Court did not consider the harm to real children that will occur when, through technological advances, it will become impossible to tell real children from “virtual” children, thereby allowing harm to real children because the government cannot tell the difference for purposes of bringing prosecution. The Court clearly did consider it and Stated:

“The Government next argues that its objective of eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well. Virtual images, the Government contends, are indistinguishable from real ones; they are part of the same market and are often exchanged. In this way, it is said, virtual images promote the trafficking in works produced through the exploitation of real children. The hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.” (Page 16)

Nor was the court persuaded by the argument that virtual images will make it very difficult for the government to prosecute cases. As to this concern, the Court stated the following:

Finally, the Government says that the possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by

using real children. Experts, we are told, may have difficulty in saying whether the pictures were made by using real children or by using computer imaging. The necessary solution, the argument runs, is to prohibit both kinds of images. The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down.

“The Government may not suppress lawful speech as the means to suppress unlawful speech.” (Pages 16–17)

And, finally, the government suggests that because the Court determined that it need not decide whether an affirmative defense could save an otherwise unconstitutional statute, it left open that possibility. That may be true, but, despite its recognition it need not decide the issue of affirmative defenses in the case before it, the Court went out of its way to make clear how it views such efforts with the following language:

“To avoid the force of this objection, the Government would have us read the CPPA not as a measure suppressing speech but as a law shifting the burden to the accused to prove the speech is lawful. In this connection, the Government relies on an affirmative defense under the statute, which allows a defendant to avoid conviction for non-possession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children. See 18 U.S.C. §2252A(c).”

“The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense. In cases under the CPPA, the evidentiary burden is not trivial. Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor.” (Pages 17–18)

The *Ashcroft* decision, essentially reiterated the principles of *Ferber* regarding the boundaries for fighting child pornography:

1. Non-obscene descriptions or depictions of sexual conduct that do not involve real children are a form of speech, even if it is despicable speech, protected by the First Amendment. (Reaffirming *Ferber*.)
2. The government should focus its efforts on education and on punishment for violations of the law by those who actually harm children in the creation of child pornography rather than on abridgment of the rights of free speech of those who create something from their imagination. Slip Opinion at 7 [*Kingsley Int’l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 689 (1959)]

3. The fact that speech may be used to perpetrate a crime, for example, enticement or seduction, is insufficient reason to ban the speech. “The government may not prohibit speech because it increases the chance an unlawful act will be committed ‘at some indefinite future time.’” Slip Opinion at 15 [*Hess v. Indiana*, 414 U.S. 105, 108 (1973) (*per curiam*)]
4. “The Government may not suppress lawful speech as the means to suppress unlawful speech.” Slip Opinion at 17. Banning protected speech (virtual child porn) in order to ban unprotected speech (child porn using real children) “turns the First Amendment upside down.” *Id.* “Protected speech does not become unprotected merely because it resembles the latter.” *Id.*

CONCLUSION

Because H. R. 4623 repeats the same mistakes condemned in *Ashcroft v. Free Speech Coalition*, it is not likely to be upheld.

JOHN CONYERS, JR.
 BARNEY FRANK.
 JERROLD NADLER.
 ROBERT C. SCOTT.
 MELVIN L. WATT.

